Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

RICHARD SANDHAUS a/k/a DICK SANDHAUS, and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Petitioners,

vs.

STEPHEN WEINREICH,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is fundamental due process violated where the district court pierced the corporate veil based on plaintiff's post-trial request for this equitable relief, even though plaintiff never sought veil-piercing (i) in his complaint; (ii) in any pre-trial motion; (iii) in the pre-trial order which superseded the complaint; or (iv) at trial?

2. Under Fed. R. Civ. P. 15(b), can a claim, such as veil-piercing, be deemed to have been tried by implied consent where evidence relevant to the unpled claim is admitted on an unrelated factual issue?

LIST OF PARTIES

The parties to the proceedings below were those listed in the caption above.

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No.

In The

Supreme Court of the United States

October Term, 1995

RICHARD SANDHAUS a/k/a DICK SANDHAUS, and SCIENCE FACTION CORPORATION, and DICK SANDHAUS PRODUCTIONS, INC.,

Petitioners,

vs.

STEPHEN WEINREICH,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard Sandhaus, Dick Sandhaus Productions, Inc., and Science Faction Corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinions below in reverse chronological order are as follows: the opinion of the United States Court of Appeals for the Second Circuit, dated June 8, 1995, affirming the district court is unreported, and reproduced in the Appendix at 3a. The post-trial opinion of the United States District Court for the Southern District of New York, dated June 30, 1994, is reported at 156 F.R.D. 60 (S.D.N.Y. 1994), and reproduced at 8a. The district court's opinion on the bench trial, dated April 28, 1994, is reported at 850 F. Supp. 1169 (S.D.N.Y. 1994), and reproduced at 17a. The district court's pre-trial opinion, dated July 24, 1989, granting partial summary judgment, is officially unreported, but found at 1989 WL 130641 (S.D.N.Y.) and 1989 U.S. Dist. LEXIS 8424, and reproduced at 54a.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's diversity jurisdiction under 28 U.S.C. § 1332(a)(1) as the parties are citizens of different states. The district court entered its judgment on July 29, 1994. The Second Circuit entered its judgment affirming the district court on June 8, 1995. No mandate issued, however, because the Second Circuit granted petitioners' motion for a stay under F.R.A.P. 41(b) which requires a showing that a petition for certiorari raises "a substantial question." The Second Circuit entered the stay order on July 19, 1995. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law.

Fed. R. Civ. P. 15(b) provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

STATEMENT OF THE CASE

Plaintiff commenced this diversity action against defendants Richard Sandhaus, Dick Sandhaus Productions, Inc. ("DSPI") and Science Faction Corp. ("SFC") on May 23, 1983.[1] Richard Sandhaus is the sole shareholder of the two corporate defendants.

Plaintiff alleged a joint venture, breach of contract and *quantum meruit* against all three defendants. Plaintiff incorporated in the complaint a letter agreement providing he was entitled to a third of the net profits of the laser system then currently in production. SFC did not exist at the time the letter agreement was signed. Defendants denied the existence of the contract, and denied plaintiff was entitled to further compensation in *quantum meruit.*

Following six years of discovery, defendants moved for summary judgment. Then district judge Charles E. Stewart, Jr. construed the complaint as alleging three causes of action for joint venture, a fourth for breach of contract, and a fifth for *quantum meruit.* He granted partial summary judgment dismissing the joint venture claims.

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1. Plaintiff also sued Science Faction Systems. This party was dismissed, without objection, because there was never any such entity. *Weinreich v. Sandhaus*, 1989 WL 130641 at 6 (S.D.N.Y. 1989) (Stewart, J.).

In the fourth cause of action, plaintiff alleged that defendants "did fail to exercise ordinary care and did negligently maintain their records and fail to pay plaintiff" a third of net profits from the laser light show business. Finding the complaint was "not a model of clarity," Judge Stewart ruled this allegation could be read to state a claim for breach of contract.

The complaint did not contain any claims for corporate veil piercing, and the district court did not find any. Rather, the causes of action which remained were that: (i) plaintiff had a direct contractual relationship with all three defendants which they breached; and (ii) plaintiff was entitled to recover against each defendant in *quantum meruit*.

Discovery and related motion practice continued for four more years. No discovery was ever taken on the issue of veil piercing. In November of 1993, district judge Robert W. Sweet signed a fifty page pre-trial order in which plaintiff alleged two causes of action: breach of contract and *quantum meruit*. The pre-trial order superseded the complaint and governed the claims that went to trial.[2] Nowhere in the document was the issue of veil piercing ever mentioned.

The New York Court of Appeals has declared that, to pierce the corporate veil under New York law, the plaintiff must prove three essential elements: (i) domination of one or more corporations; (ii) for personal and not corporate purposes; and (iii) use of that domination to commit a fraud against the plaintiff. *Morris v. New York State Department of Taxation and Finance*, 82 N.Y. 2d 135, 603 N.Y.S. 2d 807 (1993).[3]

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2. Fed. R. Civ. P. 16(e); *see Joseph Mfg. Co. v. Olympic Fire Corp.*, 986 F.2d 416 (10th Cir. 1993); *Canal Ins. Co. v. First Gen. Ins. Co.*, 889 F.2d 604 (5th Cir. 1989); *Ramirez Pomales v. Becton Dickinson & Co.*, 839 F.2d 1 (1st Cir. 1988); *Petree v. Victor Fluid Power, Inc.*, 831 F.2d 1191 (3d Cir. 1987).

3. Notably, New York does not permit veil piercing based simply on a (Cont'd)

The complaint was silent regarding any of these elements of veil-piercing much less all three. Likewise, none of the elements were ever discussed in extensive pre-trial motion practice, including two motions for summary judgment.

The action finally went to trial nearly eleven years after the complaint was filed. Trial took place before Judge Sweet over ten days. In his opening statement, plaintiff's counsel reiterated that his claims were for breach of contract and *quantum meruit.* In his opinion, Judge Sweet found, *inter alia,* that: (i) the letter incorporated into the complaint was an enforceable agreement between plaintiff and DSPI only; and (ii) DSPI had no net profits.

In his post-trial brief, plaintiff requested for the first time that the district court pierce the corporate veil to reach the assets of SFC and Mr. Sandhaus personally. The district judge obliged, and awarded plaintiff damages from the profits earned by SFC. The corporate veil was pierced simply because DSPI was by then dormant, and Mr. Sandhaus was the president and sole shareholder of both corporations.

The district court cited to evidence introduced by both sides to support the veil-piercing. However, all this evidence related to breach of contract or *quantum meruit.* Plaintiff's evidence related to the safety and design of one laser light system, which defendants contended plaintiff had designed defectively.

(Cont'd)
showing that the corporation is an "alter ego" or "instrumentality" of a dominant shareholder, notwithstanding the courts' broad powers in equity. Rather, there must be proof of shareholder dominance for the purpose of committing a fraud. *See* Richard H. Silberberg and Robert Manson *"Morris" Fortifies the Corporate Veil*, N.Y.L.J. (April 12, 1994), p. 1 *et seq.* Indeed, the corporate veil may not be pierced where the corporation has no assets to pay a judgment, even if it was structured precisely for that purpose. *Walkovszky v. Carlton*, 18 N.Y. 2d 414, 276 N.Y.S. 2d 585 (1966).

Defendants' evidence was introduced solely in support of their defenses that: (i) neither Mr. Sandhaus nor SFC was a party to the letter agreement between plaintiff and DSPI; and (ii) income from the laser system which earned a profit was not attributable to DSPI because that system was developed by SFC.

The district court made no finding whatsoever that the veil-piercing claim was tried by express or implied consent under Fed. R. Civ. P. 15(b). Accordingly, the district court neither addressed nor ruled on the threshold issue of due process, as the issue did not develop until after the district court issued its opinion.[4]

On appeal, the due process violation was presented as the threshold issue. Defendants SFC and Mr. Sandhaus argued that, by ruling against them on a theory never pled nor tried, the district court violated procedural due process, relying on precedent from other Circuits. Plaintiff conceded the veil-piercing issue was never pled nor tried by express consent, but argued that the evidence cited by the district court demonstrated a tacit finding by the district court that the veil-piercing issue had been tried by implied consent.

The Second Circuit did not address this argument in its opinion. Rather, the court simply affirmed "for substantially the same reasons expressed in the decision of the district court."

Hence, the Second Circuit refused to apply the principle clearly established in seven other Circuits that, to protect due process, trial of a claim by implied consent will be found only where the evidence admitted related *solely* to the unpled issue, and was irrelevant to any other issue already raised in the pleadings.

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4. Thereafter, the district court issued a post-trial opinion increasing the damage calculation.

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S OPINION CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE MAJORITY OF CIRCUITS.

In *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484 (11th Cir. 1987), the Eleventh Circuit was faced with a very similar set of facts to the case at bar. Plaintiff brought a claim against a corporate defendant and its sole shareholder alleging trademark infringement, unfair competition and breach of a sales contract. However, the breach of contract claim was alleged against the corporate defendant only, and not against the shareholder.

The district court pierced the corporate veil and entered judgment against both the corporate defendant and its shareholder on the contract claim. The Eleventh Circuit reversed, ruling that, although there was sufficient evidence to pierce the veil under Florida law, no veil-piercing claim was in the case. Notably, the Eleventh Circuit rejected plaintiff's claim that the veil-piercing claim was tried by implied consent, holding:

> A party cannot be said to have implicitly consented to the trial of an issue not presented by the pleadings unless that party should have recognized that the issue had entered the case at trial.

Id. at 1487.

The court further held that, although the veil-piercing evidence "might" have been relevant to another claim in the

complaint, there was no implied consent because "[t]he introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues are entering the case." *Id.*

The First, Fifth, Sixth, Eighth, Ninth and Tenth Circuits have all adopted similar tests for implied consent. *Campana v. Eller*, 755 F.2d 212, 215 (1st Cir. 1985) ("The test of consent to the trial of an issue is whether a party permitted the introduction of evidence which was relevant only to that issue"); *Trinity Carton Co., Inc. v. Falstaff Brewing Corp.*, 767 F.2d 184, 193 (5th Cir. 1985)("Trial by consent may not be deemed where evidence concerning the issue that is maintained to have been thusly tried is also relevant to other issues that in fact have been pleaded and tried, at least in the absence of clear notice that such issue was being raised"); *International Harvester Credit Corp. v. East Coast Truck*, 547 F.2d 888, 890 (5th Cir. 1977) ("The introduction of evidence relevant to an issue already in the case may not be used to show consent to the trial of a new issue absent a clear indication that the party introducing the evidence is attempting to raise a new issue"); *MBI Motor Co., Inc. v. Lotus/East, Inc.*, 506 F.2d 709, 711 (6th Cir. 1974) ("Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue"); *Pariser v. Christian Health Care Systems, Inc.*, 816 F.2d 1248, 1253 (8th Cir. 1987) (evidence introduced that was relevant to unpled claim "was also relevant to [plaintiff's] other claims, so its introduction did not provide the defendant with any notice that [the unpled] claim . . . was being tried"); *In re Acequia, Inc.*, 34 F.3d 800, 814 (9th Cir. 1994) ("Where evidence alleged to have shown implied consent was also relevant to the other issues at trial, it cannot be used to imply consent to try the unpleaded issue" [internal punctuation omitted]); *Cook v. City of Price, Utah*, 566 F.2d 699 (10th Cir.

1977) ("When evidence claimed to show trial of an issue by consent pursuant to Rule 15(b) is relevant to a separate issue already in the case, it would be unjust to the opposing party to consider a new theory of recovery after trial is complete").

Here, the Second Circuit found implied consent from the unchallenged admission of evidence that equally related to the contract issues properly in the case. The Second Circuit's decision was contrary in principle to the standard established by seven other Circuits. Thus, the Court should grant certiorari to give guidance to the lower courts regarding the requirements of implied consent and procedural due process under Rule 15(b).

II.

THE SECOND CIRCUIT ERRED ON A RECURRING ISSUE OF FUNDAMENTAL LEGAL AND CONSTITUTIONAL IMPORTANCE.

Adjudication of an unpled cause of action by post-trial ambush, as occurred here, not only contravenes the Federal Rules of Civil Procedure, it violates fundamental principles of due process. As the Fifth Circuit stated:

> [E]ach party is entitled to know what is being tried, or at least to the means to find out. Notice remains a first-reader element of procedural due process, and trial by ambush is no more favored here than elsewhere.

Jimenez v. Tuna Vessel "Granada", 652 F.2d 415, 420 (5th Cir. 1981).

Clearly, a defendant would prepare and offer different proof to defend against a claim that he was a direct party to a contract

than he would to a claim that he was liable for another party's contract on a corporate veil-piercing claim. Hence, if the defendant does not have notice of the veil-piercing claim, he cannot possibly have been given an adequate opportunity to defend.

III.

THE FUNDAMENTAL IMPORTANCE OF THE ISSUE TO THE JUDICIAL SYSTEM WARRANTS THIS COURT'S EXERCISE OF ITS SUPERVISORY JURISDICTION TO SET A CLEAR STANDARD.

It has been said that the function of the appellate court is:

> to announce, clarify, and harmonize the rules of decision employed by the legal system which it serves. Included within this role is the function of resolving conflicts among the decisions of those lower courts subordinate to the appellate court so that the law is evenhandedly applied within the system.

Arthur D. Hellman, *Error Correction, Lawmaking and the Supreme Court's Exercise of Discretionary Review,* 44 Univ. of Pitt. L. Rev. 795 (1983).

The business of American courts is dedicated in large part to commercial litigation. In such cases, shareholders relying on the protections of limited liability must be solidly on notice that the corporate tissue is under attack. Piercing the corporate veil is an equitable cause of action that should be pled and proven, *see, e.g., Lally v. Catskill Airways, Inc.*, 198 A.D. 2d 643, 603 N.Y.S. 2d 619, 621 (3d Dep't 1993), *David v. Glemby Co., Inc.*, 717 F. Supp. 162, 165 (S.D.N.Y. 1989), and not simply raised after trial as a

convenient mechanism to assure the plaintiff there will be a pocket from which to recover.

The law has long recognized that: (i) limited liability is the essential benefit of doing business in the corporate form; and (ii) the limited liability principle is both economically sound and a fundamental tool of democracy. *Berkey v. Third Avenue Railway Co.*, 244 N.Y. 84 (1926) (Cardozo, J.); Presser, Commentary: *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U.L. Rev. 148, 155-57 nn. 32-34, 163 (1992). As one noted commentator has observed:

> Limited liability is a presumptive rule of law that facilitates the development of public markets for securities, permits the allocation of risk or benefits between parties, and supports the certainty of planning by those who have organized the corporation.

Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1073 (1991).

Precisely because shareholders are protected by the corporate form, veil-piercing claims are common in commercial litigation. On average, the federal and state courts throughout the nation pierce the corporate veil in forty percent of the cases in which the claim is raised. *Id.* at 1048-49, 1052.

Moreover, the Second Circuit adjudicates cases from New York, which the courts have recognized as the commercial center of the nation. *See, e.g., United States v. Hurwitz*, 573 F. Supp. 547 (S.D.N.Y. 1983). Permitting the Second Circuit to depart in principle from seven other Circuits in its treatment of implied consent under Rule 15(b) — particularly as it impacts on commercial cases — would be deleterious to the sound administration of the law.

Due process demands that every litigant be on notice of the claims against him or her, and not be surprised with new theories of liability raised after trial. The Second Circuit's implicit departure from the stricter interpretation of implied consent under Rule 15(b) by other Circuits warrants review by this Court.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT STAYING MANDATE, DATED JULY 19, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-7555; 94-7913

WEINREICH

V.

SANDHAUS

NOTICE OF MOTION
for Stay of Mandate

MOTION BY:

Samuel A. Abady, Esq.

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405 Park Avenue, 15th Floor
New York, New York 10022

Has consent of opposing counsel:
A. been sought? *yes*
B. been obtained? *no*

Has service been effected? *yes*

Argument date of appeal:
June 5, 1995

Judge whose order is being appealed:
Robert W. Sweet

Appendix A

Brief statement of the relief requested:
Stay of mandate pending Petition for Writ of Certiorari

s/ Samuel A. Abady
Attorney for Defendant

Appearing for:
Sandhaus, DSPI & SFC

Date: *6-28-95*

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is *granted*

s/ Wilfred Feinberg
s/ Roger J. Miner
s/ José A. Cabranes
Circuit Judge

APPENDIX B — JUDGMENT, ORDER AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 8, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

94-7555
94-7913

STEPHEN WEINREICH,

Plaintiff-Appellee-Cross-Appellant,

v.

RICHARD SANDHAUS, also known as Dick Sandhaus, SCIENCE FACTION CORPORATION; and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants-Appellants-Cross-Appellees.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of June, one thousand nine hundred and ninety-five.

PRESENT:

HON. WILFRED FEINBERG,
HON. ROGER J. MINER,
HON. JOSÉ A. CABRANES,
Circuit Judges.

Appendix B

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is AFFIRMED.

Appeal and cross-appeal from a judgment entered in the United States District Court for the Southern District of New York (Sweet, J.), the district court having determined that the defendants had breached a contract with plaintiff and having awarded money damages for the breach.

Stephen Weinreich commenced this action against defendants Richard Sandhaus, Science Faction Corporation ("SFC"), and Dick Sandhaus Productions, Inc. ("DSPI"), alleging that he was owed money as a result of a letter agreement between the parties. In November of 1977, Sandhaus, Weinreich, and a third individual agreed to work together in the production of laser light show systems. They began work on the development of a system — known as the "Silver System" — to be used in an upcoming tour for a major rock group.

In May of 1978, after work had begun on the project, Weinreich entered into a letter agreement with Sandhaus, who was acting in his capacity as an officer of DSPI, a corporation controlled by him. The agreement provided that "all design work done by Stephen Weinreich for [the Silver System] is for consideration of a 33 1/3% interest in the net profit earned by sale or rental of this or similar or derivative systems." Although the Silver System proved unsuccessful, Weinreich continued to work with Sandhaus on other laser light show projects.

Appendix B

In June of 1978, Sandhaus formed SFC, and SFC acquired the Silver System from DSPI. SFC, as well as DSPI, was controlled by Sandhaus. SFC's ledger reflects that it paid $9,000 for the Silver System, although defendants were unable to produce a corresponding ledger entry for DSPI. Then, in November of 1978, Weinreich and Sandhaus collaborated on the creation of the "2000 System," which was more successful than the Silver System and was used through December of 1986. After the 2000 System was developed, the defendants developed a third system, known as the "360 System."

Weinreich never received any part of the profits earned by the laser light systems, and he brought this action to recover his share of those profits. He contended that the 2000 and 360 Systems were "derivative" of the Silver System and that, under the letter agreement, he was entitled to one third of the profits generated by them. After a bench trial, the district court determined that the letter agreement was an enforceable contract and that Weinreich was entitled to one-third of the net profits generated by the Silver System and the 2000 system. The district court awarded Weinreich $89,824.57 plus interest.

We affirm the judgment substantially for the reasons expressed in the decision of the district court dated April 28, 1994, *Weinreich v. Sandhaus*, 850 F. Supp. 1169 (S.D.N.Y. 1994), and the decision amending the judgment dated June 30, 1994.

s/ Wilfred Feinberg
HON. WILFRED FEINBERG,

s/ Roger J. Miner
HON. ROGER J. MINER,

s/ José A. Cabranes,
HON. JOSÉ A. CABRANES,
Circuit Judges.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JULY 29, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (RWS)

No. 94, 1589

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

JUDGMENT

This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff Stephen Weinreich recover of the defendants Richard Sandhaus a/k/a Dick Sandhaus, Science Faction Corporation, and Dick Sandhaus Productions, Inc. the sum of $89,824.57 plus pre-judgment interest of $88,050.64 for a total judgment of $177,875.21.

IT IS FURTHER ORDERED, AND ADJUDGED that defendants' motion to amend to correct arithmetical error,

defendants' second motion to amend findings of fact and conclusions of law, plaintiff's motion for sanctions, and Plaintiff's motion to reargue are denied.

New York, New York
July 29, 1994
Date

s/ Kimba M. Wood
Kimba M. Wood, U.S.D.J.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JUNE 30, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (RWS)

STEPHEN WEINREICH,

Plaintiff,

- against -

RICHARD SANDHAUS, a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

OPINION

APPEARANCES:

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Appendix D

Sweet, D.J.

Plaintiff Stephen Weinreich ("Weinreich") and defendants Richard Sandhaus ("Sandhaus"), Science Faction Corporation ("SFC") and Dick Sandhaus Productions, Inc. ("DSPI") (collectively the "Defendants") have brought various motions concerning the April 28, 1994 Opinion (the "Opinion") which set forth this Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a). For the reasons that follow, the Opinion is amended. In all other respects, the parties' motions are denied. Judgment shall be entered on the complaint in the amount of $89,824.57 with interest and costs.

Prior Proceedings

This action was tried before the Court for ten days, from January 5 to January 18, 1994. Thereafter, the parties made further submissions, concluding on April 22, 1994. The Opinion of April 28, 1994 followed. Familiarity with this Opinion and all prior proceedings is presumed.

On June 15, 1994, the Court heard oral argument on the parties' various motions, at which time they were deemed fully submitted.

I. *Plaintiff's Motion to Amend Findings of Fact, Conclusions of Law and Judgment*

Plaintiff has moved pursuant to Fed. R. Civ. P. 52(b) to amend the findings of fact, conclusions of law and judgment. Although the Opinion did contain findings of fact and conclusions of law, it was not a judgment. While plaintiff's motion is premature, it nonetheless may be considered. *See* 9 Wright & Miller, *Federal Practice and Procedure*, § 2582.

However, Fed. R. Civ. P. 52(b) does not permit a "party who failed to prove his strongest case . . . a second opportunity by moving to amend. . . . " *Id.*

Weinreich contends that the evidence established additional uses of the 2000 Systems after the summer of 1982, relying upon exhibits that indicate that for certain shows after this time the 2000 Systems were used, while for other shows the 360 Systems were used. *Compare* Exs. 41 and 42 ("SFC Model" designation). For many of these shows, there were corresponding contracts that indicated the amount the Defendants received. However, for other shows no such contracts were introduced into evidence. For these latter shows, the plaintiff has only estimated the amount the Defendants received and therefore has failed to carry his burden of establishing the amount of damages.

However, contracts were introduced that indicated that the Defendants received a specific amount for uses of the 2000 systems: the February 1984 show in Lafayette, Pennsylvania for $3,500.00; the May 1984 show in Chicago for $5,700.00; the June 1984 show at the Hoosier Dome for $11,000.00; the June 1984 show at Georgia World Congress Center for $18,000.00; the June 1986 show at the Grand Hyatt in New York for $9,350.00; the September 1986 show at the Bayfront Convention Center for $14,000.00; the November 1986 show at Kaufmann's for $15,000.00; the October 1986 show at the Palladium for $6,000.00; the November 1986 show at Smith Haven Mall for $16,200.00; the November 1986 show in Las Vegas for $18,000.00; and the December 1986 show in Pittsburgh for $19,800.00.[1]

1. Contracts for the following shows indicated that a 360 system was used: the June, 1986 show at the Empire State Center; the June, 1986 show at the Artpark Theater; the July, 1986 show in Indianapolis; and the September, 1986 show at Battery Park in New York. Recovery will not be permitted for these shows.

The total income for these shows is $136,550.00 and seventy-five percent of that total, $102,412.50, equals the net profit. One-third of the net profit is $34,137.50. Pursuant to N.Y. Civ. Prac. L. & R. § 5001 (a) & (b) & 5004 (McKinney 1992) ("CPLR"), plaintiff is entitled to interest at nine percent. The interest is to be computed when the damages were incurred, "or upon all of the damages from a single reasonable date." CPLR § 5001 (b). For the 1984 to 1986 period, an appropriate date for the interest to begin to be computed is August 1, 1986.

Weinreich also attacks the failure of the Opinion to draw an adverse inference against the Defendants for not retaining pre-June 1982 backup documentation concerning the ledger entries, even though this action was not commenced until 1983. This documentation was discarded when the Defendants moved offices in May 1981, and for the following year the Defendants had inadequate record keeping procedures. No additional evidence is cited to alter the finding in the Opinion that the plaintiff failed to establish that the Defendants destroyed these documents for the purpose of preventing their use in this or any other litigation. Nor is evidence proffered to establish that such backup documentation would not have supported the ledger entries, or the schedule of allocations by product.

Weinreich's remaining contentions have been considered and are hereby denied.

II. *Defendants' Motion to Amend to Correct Arithmetical Error*

Defendants' move pursuant to Fed. R. Civ. P. 52, 59 and 60 to correct an error that the Defendants made in 1990. One of the Defendants' employees allegedly failed to calculate certain

figures correctly concerning income for the 2000 Systems, and Sandhaus did not check these calculations before submitting them to the plaintiff and the Court.

The Defendants' motion is denied on several grounds. To begin with, the Defendants failed to comply with Rule 3 of the Civil Rules for the United States District Courts for the Southern and Eastern Districts of New York. Rule 3 provides:

> Upon any motion, the moving party shall serve and file with the motion papers a memorandum setting forth the points and authorities relied upon in support of the motion . . . Failure to comply may be deemed sufficient cause for the denial of the motion. . . .

This case has been pending for more than eleven years. Failing to comply with the local rules at this stage in the litigation is inexcusable. Accordingly, the Defendants' motion is denied.[2]

Defendants have moved under Fed. R. Civ. P. 60(b), which provides in pertinent part that: "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

The Second Circuit has ruled that it will not excuse a party

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2. To the extent that the Defendants' seek to use their memorandum of law filed in connection with their second motion, *see infra* section IV, as a memorandum for the instant motion, their request is denied since the memorandum is untimely.

under Fed. R. Civ. P. 60(b)(1) whose gross negligence caused the mistake from which relief is sought. *See Greenspahn v. Joseph E. Seagram & Sons,* 186 F.2d 616, 619-20 (2d Cir. 1951). In *Greenspahn,* the defendant's agent did not discover a mistake until shortly after the parties had settled their case by stipulation. The Second Circuit affirmed the trial court's denial of the defendant's motion to relieve it from the stipulation, and noted that the agent could have easily determined the mistake at issue three years before he discovered it. *Id. See also United States v. RG & B Contractors, Inc.,* 21 F.3d 952, 956 (9th Cir. 1994) (plaintiff who discovered favorable evidence subsequent to court's decision is not entitled to relief under 60(b)(1)). Likewise, in the instant case, Sandhaus had numerous opportunities to discover this mistake. Accordingly, Sandhaus' gross negligence does not warrant relief pursuant to Fed. R. Civ. P. 60(b)(1). Nor does Sandhaus' error rise to the extraordinary circumstances required to invoke Fed. R. Civ. P. 60(b)(6). *See RG & B Contractors,* 21 F.3d at 956 (citing *Ackerman v. United States,* 340 U.S. 193, 203 (1950)).

Defendants are also not entitled to relief pursuant to Fed. R. Civ. P. 60(a), which provides in pertinent part: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court . . . ." Sandhaus prepared, or supervised the preparation of, the allegedly incorrect income figure in September 1990. Thereafter, these figures were relied on in various pretrial submissions to the Court. Sandhaus also testified at trial as to the veracity of the allegedly incorrect figure. Moreover, plaintiff relied on this figure in his post-trial submission. At no time during this three and a half year period did Sandhaus bother to recheck this income figure. Sandhaus now claims that he first became aware of the incorrect computation when he read the Opinion and realized that

Weinreich had relied on the figure. Yet Weinreich had relied on this figure — at the latest — in his first post-trial submission. Defendants' motion, made at the thirteenth hour, is accordingly denied on these alternative grounds.[3]

III. *Plaintiff's Motion for Sanctions*

Plaintiff moves for sanctions against both Sandhaus and his attorney pursuant to Fed. R. Civ. P. 11 and 37, 28 U.S.C. § 1927 and the inherent power of the Court.

While Plaintiff cites to the old Rule 11, he fails to note that an amended version became effective December 1, 1993. The new version applies, where practical, to civil cases pending at the time of the amendment. *See Knipe v. Skinner,* 19 F.3d 72, 78 (2d Cir. 1994). Since it is not impractical, the amended Rule 11 will be applied to the instant motion.

Rule 11 sanctions "should be imposed with caution." *Id.* (citations omitted). Under the amended rule, the imposition of sanctions are discretionary rather than mandatory. *Id.* Moreover, the rule is not a fee-shifting mechanism which automatically requires an award after a party loses its case. Rather, courts "must strive to avoid the wisdom of hindsight . . . and any and all doubts must be resolved in favor" of the party that signed the allegedly sanctionable document. *Eastway Constr. Corp. v. City of New York,* 762 F.2d 243, 254 (2d Cir. 1985).

A Rule 11 motion "shall not be filed with or presented to the court unless, within 21 days after service of the motion . . . the

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3. To the extent that the motion is based on Fed. R. Civ. P. 52 or 59, the Defendants' arguments have been considered and are hereby denied.

challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." Fed. R. Civ. P. 11(1)(A). In the instant case, the plaintiff failed to follow this procedure. Accordingly, the motion is denied.[4]

Furthermore, the great majority of the sanctionable conduct alleged in plaintiff's motion occurred between three and six years ago. The plaintiff's motion is consequently untimely, and is thus denied on this alternative ground. *See, e.g.*, 5A Wright & Miller, *Federal Practice and Procedure*, § 1337 ("Rule 11 motions should be made promptly after the challenged conduct takes place. If the alleged misconduct occurs during pretrial or discovery, the matter usually should be resolved at once, in order to . . . discourage further abuses.") *see also General Motors Acceptance Corp. v. Bates*, 954 F.2d 1081, 1085 (5th Cir. 1992) (thirty-three month delay in filing requires rejection of sanction motion).

The plaintiff's remaining contentions in the instant motion have been considered, and are hereby denied.

IV. *Defendants' Second Motion to Amend Findings of Fact and Conclusions of Law*

Defendants' move to amend the findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, 59 and 60 on a variety of issues.

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4. Plaintiff's contention that his 1989 sanctions motion, which was subsequently withdrawn, is sufficient for purposes of the safe harbor provision of Fed. R. Civ. P. 11(1)(A) is disingenuous, given that said provision did not become effective until 1993.

Appendix D

Defendants seek to introduce evidence — certain tax returns of the Defendants — which allegedly are probative of the allocation of rent between DSPI and SFC. Defendants possessed these tax returns at the time of trial, and could have moved to have them introduced at that time. They failed to do so, and will not now be permitted to reopen the trial to introduce this evidence. *See United States v. Local 1804-1, Int'l Longshoremen's Ass'n,* 831 F. Supp. 167, 169 (S.D.N.Y. 1993) (motion to amend may not be used to introduce evidence that was available at trial but was not proffered).

Defendants' remaining contentions have been considered and are hereby denied. *See* 9 Wright & Miller, *Federal Practice and Procedure,* § 2582 (Fed. R. Civ. P. 52(b) does not permit a "party who failed to prove his strongest case . . . a second opportunity by moving to amend").

Conclusion

As set forth above, plaintiff's judgment is increased by an additional $34,137.50 plus interest. The total judgment is thus $89,824.57 plus interest on that amount as set forth above and in the Opinion, plus costs. In all other respects, the parties' motions are denied.

Settle judgment on notice.

It is so ordered.

New York, N.Y.
June 30, 1994

s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED APRIL 28, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 3966 (RWS)

STEPHEN WEINREICH,

Plaintiff,

-against-

RICHARD SANDHAUS, a/k/a DICK SANDHAUS and SCIENCE FACTION CORPORATION and DICK SANDHAUS PRODUCTIONS, INC.,

Defendants.

OPINION

APPEARANCES:

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Sweet, D.J.

This action by plaintiff Stephen Weinreich ("Weinreich")

against defendants Richard Sandhaus ("Sandhaus"), Science Faction Corporation ("SFC") and Dick Sandhaus Productions, Inc. ("DSPI") (collectively the "Defendants") was tried before the Court for ten days, from January 5 to January 18, 1994. Upon all prior proceedings, the findings of fact and the conclusions of law, judgment will be entered on the complaint in the amount of $55,687.07 with interest and costs.

Prior Proceedings

Weinreich commenced this action by the filing of a complaint on May 23, 1983 that alleged damages arising out of the collaboration of the parties on certain laser light show systems. Issue was joined and discovery proceeded.

In July 1987, an independent expert,[1] Brian O'Brien, was selected by both parties to assist the Court in resolving conflicts between Weinreich's discovery requests and the Defendants' need to protect confidential trade secrets and business information. O'Brien was charged with advising the Court if laser light show systems produced by the Defendants after 1980 were similar or derivative of the systems Weinreich worked on in 1978. O'Brien issued several reports, and amendments thereto, that concluded that the post-1980 laser light show systems were not similar or derivative of those Weinreich worked on.[2]

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1. The universe of laser light show experts is quite small. Prior to being retained as the independent expert, O'Brien had sold some equipment to the Defendants, and may have done some consulting work for them as well. When he was retained, O'Brien disclosed to Weinreich these previous equipment sales to the Defendants, but may not have disclosed his prior consulting work.

2. The first report was issued by O'Brien on November 21, 1987, and was paid for by both Weinreich and the Defendants. An amended report was issued on

(Cont'd)

Consequently, Weinreich was not entitled to discovery about these post-1980 systems.

On July 24, 1989, the Honorable Charles E. Stewart of this Court dismissed Science Faction Systems from this action. In addition, Judge Stewart granted the Defendants' motion for summary judgment dismissing Weinreich's first, second and third causes of action, which alleged a joint venture between the parties. Defendants' motion for summary judgment on the fourth and fifth causes of action, alleging *quantum meruit* and breach of contract respectively, was denied. On February 6, 1991, Judge Stewart adopted Magistrate Judge Naomi Reice Buchwald's Report and Recommendation that the Defendants' renewed motion for summary judgment on the fourth and fifth causes of action be denied. The action was assigned to this Court on December 22, 1993.

During the course of the trial in January 1994, twelve witnesses testified, two witnesses' deposition testimony were admitted in lieu of their trial testimony and numerous exhibits were admitted. Final submissions were completed on April 22, 1994, at which time the action was deemed submitted. The following constitutes the findings of fact and conclusions of law, as required by Fed. R. Civ. P. 52(a).

(Cont'd)

May 31, 1989, and was paid for by Weinreich. Pursuant to a Court order, O'Brien issued a third report, and two supplements thereto, in 1992; these reports were paid for by Weinreich. In November 1992, over Weinreich's objections and not pursuant to any Court order, O'Brien issued a supplemental report on the laser truck. This report was paid for by the Defendants. At trial, O'Brien appeared as one of the Defendants' experts, even though he held certain opinions that conflicted with their position. O'Brien anticipated being paid by the Defendants for appearing at trial.

Appendix E

Findings of Fact

Weinreich is a citizen of the State of New Jersey with a high school degree who has worked on various electro-mechanical design projects. Sandhaus is a resident of New York. SFC and DSPI[3] are both New York corporations engaged in various aspects of the entertainment business. Sandhaus is the sole shareholder and director of SFC and DSPI; he is also an officer, and has often been the only one. Sandhaus completely controls both SFC and DSPI.

In 1977, at the request of the rock band Foreigner, Sandhaus evaluated approximately eight entities in the United States and Europe that were creating laser light show systems. He concluded that those entities were not responsible and advised Foreigner not to deal with them. At about the same time, Dolgoff Holophase, Inc. — an entity that Sandhaus had an interest in — agreed to produce a laser light show system for Foreigner's 1977 tour. Sandhaus first met Weinreich through Dolgoff Holophase, and they and Michael Metz, an engineer and designer, worked together to produce this system. Because of its size, the system was known as the Elephant system. It was exhibited to Foreigner, but for a variety of reasons was not used during the 1977 tour.

Although Sandhaus was "personally humiliated" by the failure of the Elephant system, in late 1977 he approached Weinreich and Metz about working on another laser light show system for Foreigner's upcoming 1978 tour. This system became known as the Silver system. Weinreich was the principal mechanical designer for the laser projector; the electronic

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3. DSPI was originally incorporated in Connecticut. In 1977 or 1978, it became a New York corporation.

controls were manufactured by an independent contractor, 2005 A.D.

The Silver system had the following components: an external laser; slow, closed loop galvanometer scanners; a silver housing structure that tilted by manipulating devices inside the structure; dichroic filters; polarization rotators; front surface mirrors; irises to limit the range of the laser scan; linear proportional solenoids; a three color channel; bathroom glass effects selected with a linear solenoid; a dimmer/blanker; and an electronic controller system. Various light effects were created by the Silver system, including rosette figures, color separation dimmer and brighter light, and "washed" light.

Prior to April 1978, Sandhaus, Metz and Weinreich had several conversations about establishing a company to produce laser light show systems. The proposed company never came to fruition, and as a result Weinreich prepared a letter (the "1978 Letter") to govern his relationship with Sandhaus. The 1978 Letter was addressed to Sandhaus at DSPI, and provided:

> This will confirm our intention that all design work done by Stephen Weinreich for the laser light show currently in production is for the consideration of a 33 1/3 % interest in the net profit earned by sale or rental of this or similar or derivative systems at prices and conditions mutually agreeable to Sandhaus and Weinreich, such agreement not to be unreasonably withheld.
>
> Any funds drawn by Stephen Weinreich and charged against this project (other than

> expense reimbursements) will be considered as drawings on profits.
>
> This letter is not intended to be a complete agreement, but is to express the general intent of both parties and is to govern in this matter until such an agreement is executed.
>
> Your signature below indicates your agreement with these terms. Ex. 1.

The phrase in the 1978 Letter, "the laser light show currently in production," referred to the Silver system. On May 1, 1978, Sandhaus signed the 1978 Letter in his capacity as an officer of DSPI.[4]

In May 1978, the Silver system was completed and demonstrated to Foreigner. The demonstration was not successful, and the Silver system was not used on the Foreigner tour.

In June 1978, Sandhaus formed a second company, SFC. DSPI[5] and SFC shared common office space, but had separate bank accounts and ledgers, and filed separate tax forms. Neither DSPI nor SFC displayed any independent business discretion. For instance, in August 1978, Sandhaus wrote a letter on behalf of

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4. Sandhaus alleges that he was compelled to sign the letter under duress because Weinreich threatened to withhold the Silver system. The evidence is to the contrary.

5. Although it still exists and continues to pay franchise taxes, DSPI has been dormant since 1980.

SFC on DSPI stationery. Similarly, SFC's advertising literature indicated that it was "an affiliate of DSPI." Moreover, at trial Sandhaus illustrated the interconnectedness of the Defendants and his domination of both entities.[6]

The same month that it was formed, SFC acquired the Silver system from DSPI. Although Defendants cite to an SFC ledger entry that shows that DSPI was paid $9,000.00, the transaction was accomplished without any papers. While the SFC ledger does indicate that the $9,000.00 entry was for capital equipment, it does not specifically identify the Silver system as the product that was purchased. In contrast, more detailed notes existed for all other entries on that page of the ledger. Moreover, Defendants do not dispute Weinreich's contention that the DSPI revenue ledger for that time was never produced. Sandhaus also claimed that as a result of the Silver sale, DSPI was credited for certain rent payments and other expenses. However, Defendants fail to cite any ledger entries in support of their contention.

During the remainder of 1978, the Silver system was used at a disco trade show, at the Waldorf Astoria on two occasions, at a Red Cross show in Palm Springs, Florida and at the Xenon disco. Weinreich does not dispute the Defendants' contention that the net costs of the Silver system exceeded its net income, with a total negative balance of $20,289.20.

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6. In explaining DSPI's and SFC's arrangements with other entities, Sandhaus stated: "I was the subtenant . . ." Tr. 791; "I agreed to provide not only the hardware . . ." *Id.*; "So I marketed myself to him . . ." Tr. 908. Similarly, at a pretrial deposition Sandhaus explained how the Silver system was transferred from DSPI to SFC: "I am the sole shareholder of both of those corporations, and I made a decision . . . to establish [SFC, which] would deal only in the area of laser [business]." Ex. 1029, at 68.

Appendix E

Despite the problems with the Elephant and Silver systems, in the summer of 1978 Weinreich, Metz and Sandhaus started work on yet another system, the 2000 system. The components of the 2000 system were substantially the same as those in the Silver system, except for the following improvements: fast, closed loop galvanometer scanners; a black housing structure that tilted by manipulating devices outside the structure; rotary proportional solenoids; bathroom glass effects selected with a rotatable turret; and a computer controller system. Moreover, the basic optical path geometry of the Silver system was followed in the 2000 system.

Both the Silver and 2000 systems had a basic design function that was described by O'Brien:

> The [Silver] and 2000 . . . have fixed pairs of galvanometers. Each pair has a moving mirror on each galvo to steer the beam in each of two dimensions, up-down and left-right, but the galvos do not themselves move on their mountings. . . . the projection angle [of the two systems are] limited to only what the galvos can themselves alone produce, except when some auxiliary large external mirrors were employed to further direct the image. Ex. AF, at ¶ 11.

The first 2000 was delivered to the Xenon disco in the fall of 1978. By June 1979, there were approximately twelve 2000 systems in production.[7] In September 1979, Weinreich stopped

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7. Pursuant to regulations enacted by the United States Food and Drug Administration's Bureau of Radiological Health — subsequently named the Center for Devices and Radiological Health — (collectively "BRH"), producers of laser (Cont'd)

working for the Defendants. Thereafter, SFC continued to rent and sell 2000 systems. Additional features for the 2000 system were also created.

In 1981, SFC put on a laser light show at the Empire State Building that involved a 2000 system that primarily projected vertically, as opposed to horizontally. An external motor driven mirror device was attached to the 2000 housing, thereby permitting the beam to scan nearly 360 degrees. However, continuous 360 degree rotations were not possible because the system's wires would get tangled as it turned. In addition, as the system moved over 360 degrees, the images it projected would end up being upside-down.

Sandhaus maintained contemporaneous ledgers of revenues and disbursements for SFC.[8] However, Sandhaus did not allocate revenues and disbursements among the SFC products until 1990, well after the initiation of this action. According to his allocations, for the period 1978 to 1981, total income for the 2000

(Cont'd)
light show systems were required to file certain information on the product, the company and its quality control procedures. Sometime in 1978, SFC filed an initial product report with the BRH concerning the Silver system. After the filing of an initial product report, information on new laser light show systems produced by the same company could be filed with the BRH as supplemental reports to the initial report.

In late 1978 or early 1979, SFC filed supplemental reports on the 2000 with the BRH. In 1980, SFC applied for and was granted a variance for the 2000. Thereafter, SFC used the 2000 family designation for its future filings with the BRH on other products.

8. Although there were three discrepancies in the ledgers, the entire set of ledgers will not be disregarded.

system was $1,664,818.28, and total costs were $1,734,216.56, leaving a negative balance of $69,398.28. Weinreich adopted the income and cost figures for the 1978 to 1981 period as starting points, but urged corrections to support his damage claim.

An appropriate percentage of various overhead items that can be allocated to the 2000 systems is 66.95 percent, since this was the percentage of SFC's payroll that was allocated to that product. Based on this percentage, the following should be subtracted from the total cost of producing the 2000 system: (1) $26,384.61, representing the over-allocation of SFC tax penalties and interest that Sandhaus charged the 2000 system, (2) $43,590.86 in payroll taxes, representing an over-allocation of payroll taxes to the 2000 system, (3) $49,636.88 for an over-allocation of rent charged to the 2000 system,[9] (4) $24,575.70 for expenses that Sandhaus allocated to the 2000 system that SFC had already received as a credit in litigation with the rock band Kiss, and (5) $15,861.97 for over-allocations to the 2000 system of expenses that are generally not specific to any one product, including accounting services, insurance expenses, miscellaneous office expenses and a rent security deposit. In sum, the total over-allocation for the 2000 system from 1978 to 1981 was $160,050.02.[10]

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9. SFC and DSPI shared office space. However, DSPI was far less active than SFC before 1980, and thereafter it was dormant. Accordingly, it is appropriate that SFC pay four-fifths of the total rent for the office space, and that the 2000 system pay 66.95 percent of that amount.

10. Weinreich also contends that there were other overallocations. The evidence does not support Weinreich's contentions with respect to three items. The first is the $262,508.35 for production of the 2000 system from June, 1980 to December, 1981. Sandhaus acknowledges that there were no 2000 systems fabricated during this time. Weinreich thus contends that it was inappropriate to

(Cont'd)

Appendix E

The 2000 system income should also be increased by $3,410.00 for payments SFC received from the Xenon disco of $2,260.00 in sales tax income and $1,150.00 for a plexiglass case.[11]

SFC continued to rent and sell the 2000 until the summer of 1982. For the first five months of 1982, SFC received rental and sales income for 2000 systems totalling $82,875.00.

Beginning in 1981, SFC began to develop the 360 system, which was a significant departure from the Silver and 2000 systems. The 360 system could project a figure over 360 degrees without the image rotation problem associated with the Empire State Building project. As explained by O'Brien:

> Unlike the [Silver or 2000 systems], which use one or several parallel pairs of fixed galvos for simultaneous projection from a

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(Cont'd)

allocate *any* money for production, even though the 2000 systems continued to be rented during this time. However, there were expenses related to renting the 2000 systems. Although employees handled some of these tasks, outside entities did as well. Moreover, during this time Sandhaus also paid certain bills incurred previously for the fabrication of 2000 systems. The second item is $17,573.16 in capital equipment as to which there was no evidence that these expenses were not used for the 2000 systems. The third item is $32,248.65 in various expenses including telephone and telex charges and travel and trucking expenses which are not allocatable on a 66.95 percent basis, since no evidence was submitted to indicate that these charges were not for the 2000 systems.

11. Weinreich also claims that an additional $4,000 should be credited to the 2000 system because SFC received an on-screen credit in part payment for a rental. The Court will not credit the 2000 system with this amount since no evidence was introduced about the fair value of an on-screen credit.

> stationary projector box, the new 360 series uses only one pair of galvos mounted in an elaborately articulated assembly. The galvos rotate in tilt motion as a pair together on a subassembly. In addition, this entire subassembly, rotates 360 degrees on the pan axis, hence the name 360 series. This technique enables coverage with an image on an entire hemisphere and slightly more, without external mirrors for projection to any part of this hemisphere. Ex. AF, at ¶ 12.

Consequently, the 360 system was, according to its designer, Stephen Schultz, a "fundamentally new approach, not a slight extension" of the Empire State Building project. Tr. 500. Indeed, Weinreich's expert, Leo Beiser, admitted that the design change in the 360 system was a "fundamental one."

The 360 system was first used at the Knoxville Worlds Fair, which began in May 1982. At that time, three of the four then existing 360 systems were used in Knoxville. The fourth was used for a July 4th show at New York Harbor. Thereafter, except as noted below, SFC used the 360 systems for its future rentals and sales; it no longer used systems similar or derivative of the Silver or 2000 systems.

The indoor show at the Knoxville Worlds Fair used a system that was one-quarter derived from the 2000 system. O'Brien stated that the amount of derivation for this system was "probably less than half but more than a trivial portion." As noted, the Knoxville show also used three 360 systems outdoors. The total rental for all systems was $410,000.00. The evidence also shows that a system similar to the Knoxville indoor system was used in

Sao Paulo, Brazil in April 1983. The total rental for that show was $55,000.00.

For SFC income received after May 1982, $5,334.88 received from Palace Management was for a prior 2000 system sale.[12] A 2000 system was also used — together with a 360 system — at the New York Harbor show on July 4, 1982. SFC received $15,000.00 for this show. For this period, a fair cost is 75 percent of total income, based on the income and costs of the 2000 digital product.[13]

Weinreich was also involved in projects other than the Silver and 2000 systems for the Defendants. In early 1978, Weinreich participated in the design of a centerfold for Foreigner. For this project he was paid $500.00. Weinreich also worked on a commercial for Bulova, for which he was paid $250.00 for a day's work. In May 1978, Weinreich worked on a project called Laser Tinker Bell, which was designed and fabricated very quickly and was delivered to the client in Philadelphia. Weinreich was never paid for this project. In early 1979 and again in July 1979, Weinreich helped to prepare a trade show booth and brochure for SFC. He also attended one of the trade shows. Weinreich was not paid for this project. The same year Weinreich worked "a little bit" on a laser video report with Metz for SFC.

In March 1979, SFC and the rock band Kiss and its managing

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12. Weinreich also seeks to include monies received by the Defendants from the Brittania Beach Hotel, Palace Management and the Visage disco. Since these sums were merely related to the servicing of 2000 systems and for purchases of other hardware, they are not included in the 2000 system income.

13. According to Sandhaus, for the 2000 digital products, costs were $250,736.93, and income was $1,017,124.49.

agent, Aucoin Management, Inc., entered into a contract with SFC. SFC was to provide four laser and optical components for an upcoming tour by Kiss and received $130,000.00 upon the signing of the contract, and was to receive an additional $5,000.00 for each week of the twenty-six week tour. Weinreich and Metz worked on the four components full time from March to June 1979. Metz was required to take a leave of absence from another job to do so, and was paid pursuant to an employment contract. Weinreich was paid $10,700.00 for the work he did on this project.

In June 1979, the project was demonstrated to Kiss in Lakeland, Florida. The project failed to perform, and Kiss did not take it on tour. At the time, SFC had nonetheless been paid an additional $10,000.00. Thereafter, litigation ensued, and SFC was required to return the $10,000.00 it had been paid in June. SFC, however, was entitled to retain the $130,000.00 that it previously received.

In the summer of 1979, Weinreich worked on several projects, including a color chopper, a beam stealer and a laser chaser. These were all intended to be components of the 2000 system. He was not paid for this work.

For all of these projects, Weinreich did not keep any time records nor did he ever bill Defendants for his services. Nonetheless, Weinreich maintains that he worked full time for Sandhaus from April 1978 to September 1979. During this period, Weinreich was paid approximately $14,875.00, which he considered to be a draw on his agreement to receive profits.

Weinreich's claim that he worked full time from April 1978 to September 1979 is not credible. For instance, Weinreich

admitted that he did not work during the month of August 1979. Weinreich also admitted that from April 1978 to sometime that summer, he only worked twenty hours a week for the Defendants. In addition, Weinreich acknowledged that sometime before September 1979, he received $9,000.00 from other clients for several weeks of work. Finally, Weinreich's testimony at depositions and at trial concerning the amount of time he spent on particular projects varied considerably.[14]

In September 1979, Weinreich quit working with Sandhaus. The following month, Weinreich wrote Sandhaus about commissions for bringing in new business. In the letter he noted that "a resolution of the question of the Metz, Sandhaus, Weinreich relationship has not yet been resolved." In 1980, Metz sued Sandhaus for an accounting of the alleged joint venture. Metz did not prevail because the court found that he did not have an agreement with Sandhaus concerning the joint venture. (*Metz v. Sandhaus*, No. 14941/80 (N.Y. Sup. Ct. June 20, 1984)).

At the end of May 1981, SFC moved its offices from Park Avenue to West 52nd Street in New York City. In the process of moving, SFC discarded various documents, including records

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14. Weinreich's reliance on the testimony of Metz and Schultz on this point is also not persuasive. Metz, who also sued the Defendants, testified that he spent about 2000 hours working for the Defendants, and that a significant amount of that time was spent with Weinreich. However, a substantial part of their collaboration was spent working on the Silver and 2000 systems and the Kiss project, of which Weinreich is not entitled to any *quantum meruit* recovery. *See infra* section VI.

Schultz, in response to a question about how often he saw Weinreich at the Defendants' offices, testified: "If I had to try to remember and put an average on it, I think I would say 20 to 25 hours per week." Schultz, however, repeatedly testified that time frames were difficult for him to specify. Indeed, Schultz was unable to even state when he started working for the Defendants.

concerning expenses and disbursements for the Silver and 2000 systems that related to the entries in the DSPI and SFC ledgers. Sandhaus testified: "I know a great deal was lost at that time in that move, a lot intentionally, because we had no place to put the stuff." No evidence was proffered as to the contents of these documents. Weinreich failed to establish that Sandhaus destroyed these documents for the purpose of preventing their use in current or future litigation, nor was any evidence adduced that invalidated the integrity of the ledgers.

Conclusions of Law

This Court has jurisdiction pursuant to the diversity statute, 28 U.S.C. § 1332, and thus applies the choice of law rules of the forum state, New York. *Krauss v. Manhattan Life Ins. Co.*, 643 F.2d 98, 100 (2d Cir. 1981). Interest analysis is normally applied in New York to choice of law issues concerning contract disputes. *See Hutner v. Greene*, 734 F.2d 896, 899 (2d Cir. 1984). In this case such analysis is not required since the parties have assumed that New York law applies by relying on it to support their arguments. *See Walter E. Heller & Co. v. Video Innovations, Inc.*, 730 F.2d 50, 52 (2d Cir. 1984) (in New York, "in the absence of a strong countervailing policy, the parties to litigation may consent by their conduct to the law to be applied"). Accordingly, the Court will apply New York law.

I. The 1978 Letter is an Enforceable Contract

Defendants initially argue that the 1978 Letter is not a binding contract, but rather is only a letter of intent.[15] An analysis

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15. In 1982, in the Metz case, Sandhaus testified that the 1978 Letter was an agreement. At trial, Sandhaus testified that his deposition statement was incorrect.

of preliminary agreements such as this one begins with the Honorable Pierre N. Leval's opinion in *Teachers Ins. & Annuity Assoc. v. Tribune Co.*, 670 F. Supp. 491 (S.D.N.Y. 1987). *See also Arcadian Phosphates. Inc. v. Arcadian Corp.*, 884 F.2d 69 (2d Cir. 1989). There are two types of preliminary agreements. In the first, the parties have come to an agreement on all the issues that require negotiation. "Such an agreement is preliminary only in form — only in the sense that the parties desire a more elaborate formalization of the agreement." *Tribune Co.*, 670 F. Supp. at 498. *See also V'Soske v. Barwick*, 404 F.2d 495, 499 (2d Cir. 1978), *cert. denied*, 394 U.S. 921 (1969) ("the mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to that event"). This type of agreement could be referred to as a binding preliminary agreement.

The second type of preliminary agreement is termed a binding preliminary commitment. In this situation, the parties agree to an incomplete agreement but accept "a mutual commitment to negotiate together in good faith in an effort to reach a final agreement . . . ." *Tribune Co.*, 670 F. Supp. at 498.

In the instant case, Weinreich contends that the 1978 Letter is of the first type, a binding preliminary agreement. The Second Circuit considers four factors in determining whether such an agreement exists. *See Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80 (2d Cir. 1985); *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75-76 (2d Cir. 1984). The factors are:

> (1) whether there has been an express reservation of the right not to be bound in the absence of a writing;

> (2) whether there has been partial performance of the contract;
>
> (3) whether all of the terms of the alleged contract have been agreed upon; and
>
> (4) whether the agreement at issue is the type of contract that is usually committed to writing.

Winston, 777 F.2d at 80.

The Second Circuit has at various times stated that "[n]o single factor is decisive, but each provides significant guidance." *R.G. Group*, 751 F.2d at 75. *See also Consarc Corp. v. Marine Midland Bank. N.A.*, 996 F.2d 568, 576 (2d Cir. 1993). But the Second Circuit has also stated, in the context of a binding preliminary commitment, that the first factor is the most important. *Arcadian Phosphates*, 884 F.2d at 72. *See also Argonaut Ins. Cos. v. Medical Liab. Mut. Ins. Co.*, 760 F. Supp. 1078, 1083 (S.D.N.Y. 1991). Similarly, in cases involving binding preliminary agreements, the same importance should be placed on what the specific writing in question provides.

The first factor weighs heavily in favor of the plaintiff. The 1978 Letter provides: "This letter is not intended to be a complete agreement, but is to express the general intent of both parties and *is to govern in this matter until such an agreement is executed*" (emphasis added). This language indicates that the parties intended to create a more complete agreement in the future. Until such an agreement was created, however, the language clearly indicates that the 1978 Letter would govern. In contrast, contracts that were found not to be binding preliminary agreements

contained provisions indicating that the contract was not intended to govern in the absence of a complete agreement. *See, e.g., Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 262 (2d Cir.), *cert. denied*, 469 U.S. 828 (1984) (drafts that provided "when executed and delivered, this [agreement] will be a valid and binding agreement" indicated no intent to be bound until the execution of a formal contract); *R.G. Group*, 751 F.2d at 76 (explicit wording of franchise agreement that declared "when duly executed" prevented a finding that parties intended to be bound prior to such execution).

The second factor, whether there has been partial performance of the contract, also weighs in favor of the plaintiff. Neither party disputes that Weinreich worked both before and after the execution of the 1978 Letter, nor that DSPI and SFC accepted these services and periodically advanced monies for them. *See R.G. Group*, 751 F.2d at 75 ("partial performance is an unmistakable signal that one party believe there is a contract; and the party who accepts performance signals, by that act, that it also understands a contract to be in effect").

The third factor weighs slightly in favor of the Defendants, since it is acknowledged that the parties had not reached an understanding as to "net profit". However, the existence of open terms does not per se defeat a finding of a contract. Indeed, "a court should find an agreement too indefinite only as a 'last resort' when it is 'satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear.' " *Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 840 (2d Cir. 1993) (quoting *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483, 548 N.Y.S.2d 920, 923 (1989), *cert. denied*, 498 U.S. 816 (1990)). The term net profit can easily be defined by reference to an extrinsic standard.

See Black's Law Dictionary 939 (5th ed. 1979) ("Net profits. Profits after deduction of all expenses"). *Cf. V'Soske*, 404 F.2d at 499 (finding the term "audited net worth" has a well defined meaning).

The fourth factor does not favor any party. The laser light show business at the time of the events in question was experimental and uncertain. No evidence was presented that arrangements between persons doing this work were customarily of an oral or written nature, or, if contracts were used, to what extent they were more complex than the 1978 Letter. Moreover, the importance of the third and fourth factors are also tempered by the fact that the 1978 Letter specifically provided that it would govern until a more complete agreement existed.

In sum, upon consideration of the four factors, a binding preliminary agreement was reached. This conclusion is especially warranted given the language of the 1978 Letter, which explicitly provided that the agreement would govern the parties relationship until a more formal agreement was executed.

II. The Defendants are Jointly and Severally Liable under the 1978 Letter

Plaintiff seeks to hold the Defendants jointly and severally liable under the 1978 Letter. To do so, plaintiff urges the Court to pierce the corporate veil of defendant DSPI.[16] In New York, courts "disregard the corporate form reluctantly." *Gartner v. Snyder*, 607 F.2d 582, 596 (2d Cir. 1979); *see also Itel Containers Int'l Corp. v. Atlanttrafik Express Service, Ltd.*, 909 F.2d 698, 703

16. As found above, Sandhaus signed the 1978 Letter in his capacity as an officer of defendant DSPI. At the time of the signing, defendant SFC had not yet been incorporated.

(2d Cir. 1990). Between a corporation and its owners, "there is a presumption of separateness . . . which is entitled to substantial weight." *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2d Cir.) (citations omitted), *cert. denied*, 488 U.S. 852 (1988). The party seeking to pierce thus bears the burden of putting forward evidence that there is a basis to disregard the corporate form. *Brunswick Corp. v. Waxman*, 459 F. Supp. 1222, 1229 (E.D.N.Y. 1978), *aff'd*, 599 F.2d 34 (2d Cir. 1979).

To overcome the presumption of separateness and pierce the corporate veil, there must be a showing that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Morris v. Dep't of Taxation and Finance*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 810-11 (1993). *Cf. Wm. Passalacqua Builders. Inc. v. Resnick Developers South, Inc.*, 933 F.2d 131, 138 (2d Cir. 1991) ("[l]iability . . . may be predicated either upon a showing of fraud or upon complete control by the dominating corporation that leads to a wrong against third parties"); *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993). The *Passalacqua* court set forth ten factors to consider in determining whether to pierce the corporate veil:

> (1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping corporate records and the like,
>
> (2) inadequate capitalization,

(3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes,

(4) overlap in ownership, officers, directors, and personnel,

(5) common office space, address and telephone numbers of corporate entities,

(6) the amount of business discretion displayed by the allegedly dominated corporation,

(7) whether the related corporations deal with the dominated corporations at arms length,

(8) whether the corporations are treated as independent profit centers,

(9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and

(10) whether the corporation in question had property that was used by other of the corporations as if it were its own. 933 F.2d at 139.

Consideration of these factors is a fact specific inquiry that necessarily "differs with the circumstances of each case."

American Protein, 844 F.2d at 60 (citing *FMC Fin. Corp v. Murphee*, 632 F.2d 413, 422 (5th Cir. 1980)).[17] Ultimately, "the general principle followed by the courts has been that liability is imposed when doing so would achieve an equitable result." *A/S Domino Mobler v. Braverman*, 669 F. Supp. 592, 594 (S.D.N.Y. 1987) (citing *Brunswick Corp.*, 599 F.2d at 35). *See also William Wrigley Jr. Co. v. Waters*, 890 F.2d 594, 600-01 (2d Cir. 1989); *Citicorp Int'l Trading Co. v. Wester Oil & Refining Co.*, 790 F. Supp. 428, 437 (S.D.N.Y. 1992). *Cf. Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976, 985 (S.D.N.Y. 1992) (citations omitted) (existence of post-tort activity, "together with substantial ownership of stock of a corporation by one individual will support piercing the corporate veil for jurisdictional purposes on grounds of equity and fairness").

Piercing the corporate veil is appropriate in this case. The evidence demonstrates that Sandhaus was always in total control of both defendants DSPI and SFC. Moreover, if Weinreich could only pursue DSPI under this cause of action, he would essentially be denied any recovery because of Sandhaus' control of both entities. consideration of the *Passalacqua* factors, including the stock holdings by Sandhaus and common office space, supports this holding. *See Carte Blanche (Singapore)*, 2 F.3d at 28 (factors

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17. The alleged domination or fraud that forms the basis to pierce the corporate veil "must have occurred at the same time as the transaction that is complained of." *Holborn Oil Trading, Ltd. v Interpetrol Bermuda, Ltd.*, 774 F. Supp. 840, 845 (S.D.N.Y. 1991) (citing *Passalacqua*, 933 F.2d at 138). Nonetheless, the inquiry "examines the full spectrum of the relations" between the controlling party and the corporation. *Id.* To that end, the Court considers the timing of the transfer of the Silver system from DSPI to SFC to be a factor in the piercing analysis. *Cf. Kinetic Instruments. Inc. v. Lares*, 802 F. Supp. 976, 985 (S.D.N.Y. 1992) (quoting *Minnesota Mining & Mrg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985) (courts consider post-tort activities that "strip the corporation of its assets in anticipation of impending legal liability")).

listed by court that pierced corporate veil included lack of separate offices and officer who was chairman of both corporate boards); *see also Passalacqua*, 933 F.2d at 140.

As noted above, Sandhaus was in sole control of both companies.[18] *See David v. Glemby Co.*, 717 F. Supp. 162, 167 (S.D.N.Y. 1989) (in denying parent defendant's motion for summary judgment, court considers fact that those who controlled the defendant corporations referred to them as "our corporations"). Similarly, Sandhaus used DSPI stationery to write a letter on behalf of SFC. In *David*, 717 F. Supp. at 167, the court noted that the principals' use of the letterhead of one company on behalf of a second company suggested that they acted on behalf of both companies simultaneously. *See also Carte Blanche (Singapore)*, 2 F.3d at 28. SFC's advertising literature also indicated that it was "an affiliate of DSPI."

The circumstances surrounding the purported sale of the Silver system from DSPI to SFC are also suspect, based upon the facts found above, and establish that the two entities did not deal with each other at arms length. Indeed, Defendants have not cited to a specific DSPI ledger entry — unlike their SFC ledger cite — to support their position that DSPI was compensated for the sale. Furthermore, Defendants do not cite to any ledger entries to support Sandhaus' testimony that DSPI was also credited for certain office and equipment rent as part of the transaction.

Finally, the Defendants admit that DSPI has been dormant for years, and thus presumably cannot satisfy a judgment in Weinreich's favor. It is thus inequitable for defendants Sandhaus and SFC to hide behind a corporate shield. "Carrying on a

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18. *See supra* footnote 6 and accompanying text.

business without substantial capital and leaving the corporation without substantial assets to meets its debts can justify piercing the corporate veil." *Directors Guild of America, Inc. v. Garrision Productions, Inc.*, 733 F. Supp. 755, 762 (S.D.N.Y. 1990). Indeed, Sandhaus' business dealings with DSPI and SFC are similar to the facts in *Directors Guild.* There the court held the principal and a sibling corporation jointly and severally liable for the contracting corporation's judgment. A similar result is justified in this case. Accordingly, defendants Sandhaus and SFC are jointly and severally liable under the 1978 Letter.

III. Weinreich's Work on the Silver System was Sufficient to Entitle Him to Recover under the 1978 Letter

Defendants contend that Weinreich's work on the Silver system was not competent, and thus he is not entitled to recovery under the 1978 Letter as a consequence of his failure to perform pursuant to the agreement. The same argument is used by the Defendants in seeking recovery under their counter-claims. A party to a contract can expect performance with "reasonable care and competence owed generally by practitioners in the particular trade or profession." *Milau Assoc., Inc. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 398 N.Y.S.2d 882, 885 (1977).

In 1978, the laser light show business was in its infancy. As Sandhaus testified, a year earlier he had evaluated approximately eight entities that were creating laser light show systems; he found none of them responsible, and thus worked with Metz and Weinreich to create their own system. Essentially, they were starting a new venture in uncharted territory.

The parties concede that there were several problems with the Silver system, such as the tilting mechanism and the silver

housing. Indeed, the system was not used by its intended client, Foreigner. Nonetheless, the Silver system was used at various venues, including the Xenon disco and the Waldorf-Astoria. More importantly, Sandhaus continued to work with Weinreich for more than a year after Foreigner rejected the Silver system. It is simply not credible that Sandhaus would continue to work with someone for another year after determining that his services were incompetent. Accordingly, Weinreich's performance in connection with the Silver system was reasonable, given the state of the laser light show business at that time. For the same reasons, Defendants' counter-claims are dismissed.

IV. The 2000 System is Similar or Derivative of the Silver System: the 360 System is Not

The 1978 Letter provided that Weinreich would be entitled to one-third the net profits of all products that are similar to or derivative of the Silver system. Not surprisingly, the parties disagree as to the meaning of the phrase "similar or derivative." Weinreich urges a broad interpretation while the Defendants maintain that a narrow reading is appropriate.

In construing contractual provisions, courts must initially determine if the language is ambiguous. Language in a contract is "ambiguous if it is reasonably susceptible of more than one interpretation." *Burger King Corp. v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir. 1990). Moreover, "[l]anguage whose meaning is otherwise plain is not ambiguous merely because the parties urge different interpretations in the litigation." *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 906 F.2d 884, 889 (2d Cir. 1990) (citations omitted). Reference to an extrinsic standard that makes the meaning clear is appropriate. *See Mar Oil*, 982 F.2d at 840. Neither the terms "similar" nor "derivative"

are ambiguous in this context. both terms are readily defined by reference to a standard dictionary. Webster's Ninth New Collegiate Dictionary 342, 1098 (1985) defines similar as: "1: having characteristics in common . . . 2: alike in substance or essentials." Derivative is defined as: "1: formed by derivation 2: made up of or marked by derived elements."

Both the 2000 system and the Empire State Building system are similar to and derivative of the Silver system. The 360 system and all other systems developed after 1982 are not.

Both the Silver system and the 2000 system are substantially similar: the basic design function and the optical path geometry of the two systems were the same, and they both have nearly identical components, except to the extent that the 2000 has certain improved features. Significantly, the functioning of the galvanometers — which direct the laser beams — are nearly identical in both systems. The Empire State Building system was also similar to the Silver system. In fact, the evidence indicates that the Empire State Building system was simply a modified 2000.

In contrast, the 360 system was a significant departure from the Silver and 2000 systems. Unlike the prior laser light show systems developed by DSPI and SFC, the 360 could project a figure over 360 degrees without an image rotation problem. This was a significant development that was due to an entirely new assembly for the galvanometers. As O'Brien stated:

> Unlike the [Silver or 2000 systems], which use one or several parallel pairs of fixed galvos for simultaneous projection from a stationary projector box, the new 360 series

> uses only one pair of galvos mounted in an elaborately articulated assembly. The galvos rotate in tilt motion as a pair together on a subassembly. In addition, this entire subassembly, rotates 360 degrees on the pan axis, hence the name 360 series. Ex. AF, at ¶ 12.

As such, the 360 was not similar since the galvanometer characteristic between this system and the prior systems were not at all in common. Moreover, the 360 was not derivative since the galvanometer assembly, which is a significant element of these systems, was entirely new.

V. Damages for Breach of the 1978 Letter

Pursuant to the 1978 Letter, Weinreich is entitled to one-third the net profits of the Silver and 2000 systems. Certain calculations are not in dispute. For the Silver system, the profits are a negative $20,289.20. The parties, however, strenuously contest the calculation of the net profits for the 2000 series.[19]

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19. Weinreich contends that the Court should draw an adverse inference against the Defendants because Sandhaus failed to retain — during his office's 1981 move — backup documentation to support DSPI and SFC ledger entries. To draw an adverse inference against a spoliator, courts must initially determine if there was a duty to preserve evidence. If such a duty existed, courts then consider both the intent of the spoliator as well as the contents of the destroyed evidence.

Presuming Sandhaus had a duty to preserve, the destruction of the documentation was not intentional, i.e. it was not "intended to prevent the use of this evidence in litigation." *Turner v. Transit Lines, Inc.*, 142 F.R.D. 68, 74 (S.D.N.Y. 1991) (Magistrate Judge Francis), *aff'd*, 1992 U.S. Dist. Lexis 2827 (S.D.N.Y. Mar.

(Cont'd)

Appendix E

Plaintiff bears the burden of proving damages. *Manshul Constr. Corp. v. Dormitory Authority,* 79 A.D.2d 383, 386, 436 N.Y.S.2d 724, 728 (1st Dep't 1981).

According to the Defendants' calculations for the 1978 to 1981 period, total income for the 2000 system was $1,664,818.28, and total costs were $1,734,216.56, leaving a negative balance of $69,398.28. As set forth above, costs should be deducted by $160,050.02, leaving a total cost of $1,574,166.54, and income should be increased by $3,410.00, for a total income of $1,668,228.28.[20] Consequently, the net profits

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19, 1992). Nonetheless, certain circuits have held that the negligence of the spoliator can suffice to draw an adverse inference. *See Pressey v. Patterson,* 898 F.2d 1018, 1024 (5th Cir. 1990); *Glover v. BIC Corp.,* 6 F.3d 1318, 1329 (9th Cir. 1993). The Second Circuit, however, has declined to do so. *See Berkovich v. Hicks,* 922 F.2d 1018, 1024 (2d Cir. 1991); *see also Britt v. Block,* 636 F. Supp. 596, 606-07 (D. Vt.) (negligent destruction of evidence is insufficient to change the burden of proof), *aff'd mem.,* 805 F.2d 390 (2d Cir. 1986). *Cf. Skeete v. McKinsey & Co.,* 1993 U.S. Dist. Lexis 9099, at *21 (S.D.N.Y. July 7, 1993) (dicta); *Turner,* 142 F.R.D. at 75-76 (dicta).

Even if an adverse inference could be drawn for the negligent destruction of evidence, the contents of the destroyed documents in this case would not support such an inference. In cases involving negligent destruction, "it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him." *Turner,* 142 F.R.D. at 77 (citing *Stanojev v. Ebasco Services, Inc.,* 643 F.2d 914, 924 n. 7 (2d Cir. 1981)). Accordingly, "special caution must be exercised to ensure that the inference is commensurate with information that was reasonably likely to have been contained in the destroyed evidence." *Id.* In the instant case, no evidence was presented to indicate that the backup documentation would not have supported the ledger entries. Consequently, an adverse inference will not be drawn against the Defendants for failing to retain this documentation.

20. Weinreich failed to meet his burden of proof as to certain items that he sought to include as income and costs for this period. *See supra* footnotes 10 and 11.

of the 2000 System were $94,061.74. From this amount should be deducted the negative balance from the Silver system of $20,289.20, for a total net profit of $73,772.54. Weinreich is entitled to one-third this amount, $24,590.85, minus the draw on profits he previously received. Weinreich was advanced $14,875.00, of which $10,700.00 should be deducted for work on the Kiss project. The total draw is thus $4,175.00, and the total amount that Weinreich is entitled to is $20,415.85 for the 1978 to 1981 period.

Weinreich also seeks damages for the use of the 2000 system after 1981. Based on the Court's finding above, Weinreich is entitled to one-third the sum of the following: $82,875.00 for income received by SFC for the first five months of 1982; $25,625.00, which represents one-sixteenth of the income received from the Knoxville Worlds Fair show;[21] $13,750.00, which — for the same reasons as the indoor show at Knoxville — represents onefourth of the amount received for the show in Sao Paulo, Brazil; $5,334.88, for an earlier 2000 sale to Palace Management; and $7,500.00, which represents one-half of the revenue generated by the New York Harbor show in July 1982. The total income for all these projects is $135,084.88. For post-1981 uses of the 2000 Systems seventy-five percent of the total income equals the net profit, according to the Sandhaus allocation referred to in footnote 13 above. The net profit is thus $101,313.66. One-third of this total is $33,771.22.

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21. This amount is calculated as follows: only one of the four laser systems, the indoor show, used a 2000-derivative system. Thus, only one-fourth of the show's income should be credited to this indoor show. And only one-fourth of this indoor system was derived from a 2000 system. Accordingly, one-sixteenth of $410,000.00 should be considered derivative income from a 2000 system.

Appendix E

Weinreich's total damages under the breach of contract cause of action are $54,187.07. Pursuant to N.Y. Civ. Prac. L. & R. § 5001 (a) & (b) (McKinney 1992) ("CPLR"), Weinreich is entitled to interest on the breach of contract damages. The interest rate is six percent for pre-June 25, 1981 damages, and nine percent thereafter. CPLR § 5004. The interest is to be computed when the damages were incurred, "or upon all of the damages from a single reasonable date." CPLR § 5001 (b). For the 1978 to 1981 period, an appropriate date for the interest to begin to be computed is June 30, 1980. For the 1982 and 1983 period, the interest should begin to be computed on June 30, 1982.

VI. The Quantum Meruit Cause of Action

Plaintiff Weinreich also seeks recovery under *quantum meruit* from the Defendants for work performed on projects other than the Silver system. In connection with the 2000 system, Weinreich contends — without citing to any authority — that he is entitled to *quantum meruit* for the work he did on this system, even though he is receiving one-third of the net profits under the 1978 Letter. It is well settled that recovery in *quantum meruit* is unavailable where an express contract covers the subject matter. *Yonkers v. Otis Elevator Co.*, 844 F.2d 42, 48 (2d Cir. 1988). The 1978 Letter does not address Weinreich's work on systems subsequent to the Silver system. However, courts can imply terms in a contract, either in fact or in law:

> "Implied terms have been divided into three categories: (1) terms that the parties intended, (2) terms that the parties would have intended had they thought about it and (3) terms that are fair. The first involves a search for the parties' intention, the second involves a

> search for the parties' hypothetical intention, the third has nothing to do with the parties' intention, except that the court will generally not imply a term in the face of the parties' expressed intent to the contrary . . . . "Implied in law" or "constructive" terms . . . include the second and third categories. *Yonkers*, 844 F.2d at 46 (quoting Hadjlyannakis, *The Parol Evidence Rule and Implied Terms: The Sounds of Silence*, 54 Fordham L. Rev. 35, 38 n. 22 (1985)).

At trial, neither party proffered evidence concerning the first category of implied terms. Consequently, the Court considers whether a provision concerning the 2000 system is implied in law under either the second or third category for the 1978 Letter. During 1978 and 1979 the parties — and especially Weinreich[22] — acted as joint venturers. Although this collaboration never came to fruition, had "they thought about it," 844 F.2d at 46, the parties would have provided that Weinreich was entitled to one-third of the net profits from the 2000 system as well. More importantly, in any event the parties would not have provided that Weinreich was entitled to one-third of the profits *and* an hourly wage for work performed in connection with the 2000 system. For the same reasons, such a provision is fair as well. Accordingly, Weinreich may not recover an amount in *quantum meruit* for the work he did on the 2000 system.

He may, however, seek *quantum meruit* for work done on other projects. To recover in *quantum meruit*, a party "must

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22. For instance, Weinreich considered payments in connection with the 2000 system to be draws on profits.

establish performance of his services in good faith, acceptance of the services by persons to whom such services were rendered, expectation of compensation, and the reasonable value of such services." *Paper Corp. of United States v. Schoeller Technical Papers. Inc.*, 773 F. Supp. 632, 640-41 (S.D.N.Y. 1991) (citing *Martin H. Bauman Assocs. v. H&M Int'l Transp., Inc.*, 171 A.D.2d 479, 567 N.Y.S.2d 404 (lst Dep't 1991)). Plaintiff bears the burden of proof in *quantum meruit* actions. *Miller v. Maryland Casualty Co.*, 114 Misc.2d 309, 452 N.Y.S.2d 309, 311 (N.Y. Civ. Ct. 1982).

Based on the evidence presented, Weinreich has met the first three prongs of the *quantum meruit* test. Weinreich performed services for the Defendants at various times from April 1978 to September 1979. During this time, it is not disputed that Weinreich worked on various projects for the Defendants. These services were accepted by the Defendants and despite the present complaints about the quality of these services, and despite the failure of the Silver system, Sandhaus again worked with Weinreich on the 2000 system and the Kiss project, thus recognizing in fact the experimental nature of the work being performed.

The third prong of the *quantum meruit* test has also been met. Throughout their collaboration, Weinreich believed that he, Sandhaus and Metz would be joint venturers. Ultimately, this venture never materialized. It is reasonable to conclude that Weinreich would nonetheless expect to be compensated. Indeed, it is inconceivable that Weinreich would have worked for the Defendants at various times over eighteen months for free.[23]

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23. Defendants' reliance on *Reisner v. Recco Temporary Services, Inc.*, 136 A.D.2d 686, 524 N.Y.S.2d 102 (2d Dep't 1988) and *Mance v. Mance*, 128 A.D.2d

(Cont'd)

Appendix E

Weinreich's difficulty in recovering under *quantum meruit* is the fourth prong, a reasonable value for the services rendered. Specifically, the evidence presented does not support Weinreich's contention that he should be compensated at $60.00 an hour for work allegedly performed for the Defendants for forty hours a week for 78 weeks. To begin with, the work Weinreich did on the 2000 system is covered by the 1978 Letter and thus recovery under *quantum meruit* is not appropriate. The primary evidence presented in support of Weinreich's contention that he worked full time for 78 weeks is his own testimony, which was not credible on this issue.[24] Weinreich neither kept time records nor ever billed the Defendants for work he allegedly performed. Moreover, Weinreich was unable to specify how much time he spent on any particular project on any particular day. In contrast, in *Paolangeli v. Thaler*, 187 A.D.2d 881, 882, 590 N.Y.S.2d 316, 317 (3rd Dep't 1992), the court dismissed defendant's contention that there had been a failure to prove reasonable value of service when the plaintiff proffered detailed daily records of his work.[25]

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448, 513 N.Y.S.2d 141 (1st Dep't 1987) is misplaced. In *Reisner*, the plaintiff had expressly indicated that he would work a certain period without a salary. In contrast, in this case the evidence does not support a finding that if the parties' venture did not materialize, that Weinreich would not expect to be compensated for the work he had done. In *Mance*, unlike this case, the plaintiff had received a salary and fringe benefits.

24. *See supra* note 14 and accompanying text. Moreover, the testimony of Metz and Schultz, taken together with Weinreich's, is insufficient to meet plaintiff's burden in *quantum meruit*.

25. Weinreich's reliance on *Mar Oil, S.A. v. Morrissey*, 982 F.2d 840 (2d Cir. 1993), is misplaced. More disturbing, counsel's description of the holding in
(Cont'd)

Accordingly, Weinreich has not carried his burden to prove that he worked full time for eighteen months.

However, as detailed below, there were specific projects that Weinreich worked on during this eighteen month period in which the evidence supports a *quantum meruit* recovery. For these projects, a reasonable per hour rate is $25.00. This amount is based on contemporaneous work that Weinreich performed for the Defendants. For instance, Weinreich was paid $250.00 to work for the Defendants on a Bulova project for one day. Similarly, the evidence shows — and Weinreich does not dispute — that he worked for approximately three months on the Kiss project, for which he was paid $10,700.00. These two projects indicate that Weinreich was paid approximately $25.00 per hour for the work he did for the Defendants.

There are certain projects for which Weinreich has already been paid, and thus is not entitled to any further compensation. These project are: the Foreigner centerfold, for which he was paid $500.00; the Bulova project, for which he was paid $250.00; and the Washington Hilton project, for which he was paid $250.00. In addition, Weinreich was paid $10,700.00 for the Kiss project.

The evidence does support the conclusion that Weinreich be compensated for specific projects that he worked on. In May

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Mar Oil is misleading. There the court specifically held that the defendant attorney was *not* entitled to $200.00 per hour for 1200 hours because, in part, he had kept no time records. *Id.* at 840-43. What the Second Circuit did indicate — and which is applicable to the instant case — is that on remand the trial court should determine the number of hours the defendant attorney worked "with doubts resolved against [him] since he failed to keep time records." *Id.* at 843.

1978, Weinreich worked on the Laser Tinker Bell project. The evidence indicates that the project was designed and fabricated very quickly, and that Weinreich delivered it to the client in Philadelphia. Appropriate payment for this project is $400.00, representing two days work. In January 1979, Weinreich worked "a little bit" with Metz on a laser video report. An appropriate payment for this project is $100.00, representing a half day of work. At about the same time, Weinreich worked on a trade show booth and brochure, and also attended one of the trade shows. Except for testimony about attendance at the trade show, no evidence was introduced concerning the amount of time spent on these projects. An appropriate payment would be $1000.00, representing five days work.

Weinreich also seeks *quantum meruit* recovery for three separate projects concerning certain laser effects: a color chopper, a beam stealer and a laser chaser. Recovery is not appropriate for the work done on these projects since they were all intended to be components of the 2000 system.

In sum, Weinreich is entitled to $1,500.00 in *quantum meruit*. Weinreich is also entitled to interest on the *quantum meruit* damages. *See Govern & McDowell v. McDowell & Walker, Inc.*, 75 A.D.2d 979, 428 N.Y.S.2d 367, 368 (3rd Dep't 1980). The interest rate is six percent for pre-June 25, 1981 damages, and nine percent thereafter. CPLR § 5004. The interest is to be computed when the damages were incurred, "or upon all of the damages from a single reasonable date." CPLR § 5001 (b). An appropriate time for this interest to begin to be computed is June 30, 1979.

Appendix E

Conclusion

Judgment against the Defendants will be entered awarding Weinreich the sum of $55,687.07, and interest on that amount as set forth above. Settle judgment on notice.

It is so ordered.

New York, N.Y.
April 28, 1994

s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

APPENDIX F — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JULY 24, 1989

Stephen WEINREICH, Plaintiff,

v.

Richard SANDHAUS a/k/a Dick Sandhaus and Science Faction Corporation, and Dick Sandhaus Productions, Inc. and Science Faction Systems, Defendants.

No. 83 CIV. 3966 (CES).

United States District Court,
S.D. New York.

July 24, 1989.

Gerald M. Kleinbaum, New York City, for plaintiff.

Daniel Martin, Lawrenceville, N.J., for defendants.

MEMORANDUM DECISION

STEWART, District Judge.

Plaintiff Stephen Weinreich brought suit against defendants Richard Sandhaus, Science Faction Corporation ("SFC"), Dick Sandhaus Productions, Inc. ("DSPI"), and Science Faction Systems ("SFS"), alleging causes of action arising from plaintiff's involvement with defendants in the design, development, and marketing of laser light shows.[1] Defendants

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1. Plaintiff's complaint alleges five causes of action:

(Cont'd)

now move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons that follow we dismiss defendant Science Faction Systems from the action, grant defendants' summary judgment motion as to plaintiff's first, second, and third causes of action, deny defendants' summary judgment motion as to plaintiff's fourth and fifth causes of action, and deny the applications for sanctions made by both parties.

Factual Background

In late 1977 or early 1978, plaintiff and Sandhaus, along with a third party, Michael Metz, began work on the development of a laser light entertainment system — the "Silver System" — to be used by the "Foreigner" rock group on one of its upcoming tours. Both sides agree that there was a discussion among the parties to form a corporation to design and market laser light shows, and that Sandhaus was to draw up a formal agreement after the parties had established a "track record" of working together.

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First: payment to plaintiff of his "full share of the profits from the alleged joint venture;

Second: an accounting pertaining to the businesses created by the alleged joint venture;

Third: a constructive trust of the assets of defendant Science Faction and Sandhaus Productions acquired after January 1, 1978;

Fourth: payment in quantum meruit for services rendered;

Fifth: a failure "to exercise ordinary care" with regard to record-keeping and a failure to pay plaintiff his share of Science Faction's assets and profits.

Appendix F

Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Defts. Memo.") at 6; Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pltf. Memo.") at 2.

On May 1, 1978 an agreement (the "May 1st Letter") was signed by both Weinreich and Sandhaus which "confirmed [the parties'] intention" that all the design work done by plaintiff for the "laser light show currently in production" was to be done in exchange for 1/3 interest in the net profits earned by sale or rental of the light show "or similar or derivative systems." The letter further stipulated that funds drawn by plaintiff were to be considered as a drawing on profits and that the letter was to govern the relationship until a more complete agreement was executed.

In June of 1978, Sandhaus had SFC incorporated to manufacture, rent, and sell laser light shows. Plaintiff asserts that between June and December of 1978, during which time plaintiff and Metz continued to design and develop projects, Sandhaus promised he would formally distribute stock in SFC to each of them. Defendants concede that discussions were held as to stock interest in SFC. Deft. Memo. at 7. However, defendants argue that plaintiff merely performed services for SFC for which he was paid and that no agreement was ever reached regarding stock distribution.

In the summer of 1979, plaintiff ceased working with SFC. On October 10, 1979, plaintiff sent Sandhaus a letter setting out a proposed commission arrangement for himself as the relationship among the three parties had not been for himself resolved." This commission agreement was not finalized.

Appendix F

In 1980, Metz filed an action in state court for an accounting and damages arising out of the same circumstances as the instant lawsuit. Metz's action was dismissed by a grant of summary judgment entered on July 26, 1984 by the Honorable Michael J. Dontzin. Plaintiff filed suit in this court in 1983.

Plaintiff alleges that a joint venture was established by the parties to create and market laser light shows. Defendants counter by stating that Weinreich and Metz were merely hired by DSPI to design the Silver System, and were duly compensated for their work.

Discussion

Defendants argue that the first, second, third, and fifth causes of action must be dismissed as too vague. Defts. Memo. at 8. Further, defendants contend that the first, third and fifth causes of action do not allege a cognizable legal theory upon which relief may be granted. Id. at 9. Accordingly, defendants assert that the first, second, third and fifth claims fail to state a claim on which relief may be granted. Id. For purposes of organizational clarity, we will discuss plaintiff's fifth cause of action first.

A. The Fifth Cause of Action

We agree with defendants that plaintiff's pleadings are not a model of clarity. Indeed, plaintiff's fifth cause of action could be construed as merely a reiteration of the first three causes of action which allege the existence of a joint venture. However, we construe plaintiff's fifth cause of action as alleging a breach of contract and as an alternative cause of action to the first three causes of action. See Fed.R.Civ.P. 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternatively or

hypothetically, either in one count or defense or in separate counts or defenses."); Fed.R.Civ.P. 8(f) ("All pleadings shall be so construed as to do substantial justice.").[2]

Under Fed.R.Civ.P. 8(a)(2) a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." In short, the Federal Rules require only that the defendant be given fair notice of the plaintiff's claim and upon what ground it rests. See Conley v. Gibson, 355 U.S. 41, 47 (1957). Therefore, we find, notwithstanding the inartfulness of the pleading, that there are adequate allegations in the instant complaint to fairly apprise defendants of the nature and factual basis of a breach of contract claim, and that plaintiff's fifth cause of action adequately sets forth such a claim. Accordingly, we construe plaintiff's fifth cause of action as a breach of contract claim, and deny defendants' motion to dismiss it. We turn next to the joint venture claims as set forth in the first three causes of action.

B. Joint Venture

A joint venture has been defined as "an informal partnership between two or more persons for a limited undertaking or purpose." Chromalloy American Corp. v. Universal Housing Systems of America, Inc., 495 F.Supp. 544, 549 (S.D.N.Y.1980), aff'd, 697 F.2d 289 (2d Cir.1982). The elements of a joint venture

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2. This construction is bolstered by the fact that there is an allusion to "contractual damages" in plaintiff's original memorandum of law, see Pltf. Memo. at 17, and an explicit reference to a breach of contract claim in his sur-reply. See Plaintiff's Reply Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pltf. Reply Memo.") at 6, 27-29. Further, plaintiff's correspondence with the court has made explicit references to a contract between the parties based on the May 1st Letter. See April 17, 1989 Letter of Daniel Martin at 3.

are: a mutual understanding to share profits and bear the burden of losses; joint control over property; joint contribution of property, financial resources, efforts, skill or knowledge; and an agreement manifesting the intent of the parties to be associated as a joint venture. Id.; see also Mendelson v. Feinman, 143 A.D.2d 76, 531 N.Y.S.2d 326, 328 (2d Dept.1988) (factors to be considered in determining the existence of a joint venture are the intent of the parties (express or implied), joint control and management of the company, sharing of profits and losses, and whether there was a combination of property, skill or knowledge). It has been asserted that an absence of one of the elements is fatal to a claim of the creation of a joint venture. See Precision Testing Laboratories v. Kenyon Corp., 644 F.Supp. 1327, 1348 (S.D.N.Y.1986). In assessing whether a joint venture has been created, the ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the comingled property and interest of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit. Mendelson, 531 N.Y.S.2d at 328.

It is this trust that creates a fiduciary duty which, if breached, will lead to an accounting. Id. Under New York law, "the crucial element" establishing a joint venture is the "mutual promise of the parties to share in the profits . . . and submit to the burden of making good the losses." Mallis v. Bankers Trust Co., 717 F.2d 683, 690 (2d Cir.1983) (quoting Steinbeck v. Gerosa, 4 N.Y.2d 302, 317, 175 N.Y.S.2d 1, 13 (N.Y.1958) (emphasis in original)).

Appendix F

C. Summary Judgment

Before discussing the parties' substantive arguments, a brief review of the principles governing summary judgment is appropriate. Summary judgment may not be granted unless there is no genuine issue of material fact to be tried and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c). The task of the trial court in deciding a motion for summary judgment is not to try issues of fact, but rather determine whether there are issues of fact to be tried. See Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir.1989). On a motion for summary judgment the burden is on the moving party to establish the lack of any genuine issue of material fact, and summary judgment must be denied if the movant does not sustain this burden even if the adversary has not offered any opposition. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 161 (1970). In assessing the record to determine if there is a genuine issue of material fact, all factual inferences are to be drawn in favor of the party against whom summary judgment is sought. See Balderman v. U.S. Veterans Administration, 870 F.2d 57, 60 (2d Cir.1989). Summary judgment is ordinarily inappropriate where an individual's state of mind is implicated. Id. However, there is no genuine issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986). That is there must be evidence on which a jury could reasonably find for the plaintiff. Id. at 252. With this in mind we turn to the parties' contentions.

D. Sharing of Losses and Intent to Form a Joint Venture

Defendants claim that there is no genuine issue of fact regarding plaintiff's agreement to share the burden of losses. They point out that Weinreich expressly stated in his deposition

that in the event there were any losses, he had no obligation, liability, or responsibility for them. April 10, 1989 Affidavit of Gerald Kleinbaum ("Kleinbaum Affidavit"), Exhibit K (Weinreich deposition at 341742). Further, defendants argue that plaintiff did not even risk losing the value of his services since he took $16,000 as a draw against anticipated net profits. Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Reply memo.") at 10. Plaintiff counters by stating that he performed services for the alleged joint venture for two years on the understanding that if the venture was not ultimately profitable he would not receive the "fair value" of his services. May 5, 1989 Affidavit of Stephen Weinreich at P 9.[3] Consequently, plaintiff contends that as an individual who offered his services for a share of net profits and risked losing the value of those services, he is considered to have fulfilled the "risk of loss" requirement under New York law. See Ramirez v. Goldberg, 82 A.D.2d 850, 852, 439 N.Y.S.2d 959, 961 (2d Dept.1981); cf. Marston v. Gould, 69 N.Y. 220, 224-25 (1877) (a share in net profits implies a participation in losses).[4]

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3. Plaintiff's submission of an affidavit by Juergen Bayer in which the affiant states that plaintiff personally assumed the payment of a DSPI bill for $900 is of little value for purposes of his contention that he was liable for losses of the joint venture. Defendant suggests that plaintiff paid the bill to preserve an ongoing individual relationship with Bayer. However, even assuming defendants' suggestion to be inaccurate, it is our view that plaintiff's voluntary payment of the DSPI bill still would not rise to the assumption of personal liability for the debts of the enterprise to third party creditors — a responsibility plaintiff expressly states he did not have. If anything, the payment of the DSPI bill tends to serve defendants' contention that all work on the Silver System was done under the auspices of DSPI.

4. Plaintiff's contention that he risked losses since he only took $16,000 as a "draw on profits" is not dispositive of whether he, in actuality, risked loss since plaintiff makes no claim that he was liable to return the amount drawn in the event the business ultimately proved unprofitable. In fact, plaintiff asserted in his

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However, we believe also relevant to an inquiry of whether a party "risked loss" is whether he also agreed to assume personal responsibility for the potential legal liabilities of the enterprise. Cf. Sitchenko v. DiResta, 512 F.Supp. 758, 762 (E.D.N.Y.1981) (partners are jointly liable with respect to partnership's contractual obligations); Pedersen v. Manitowoc Co., 25 N.Y.2d 412, 419, 306 N.Y.S.2d 903, 909 (1969) (legal consequences of joint venture almost identical with that of partnership and when tort is committed by firm the wrong is imputable to all partners jointly and severally); cf. Hanlon v. Melfi, 102 Misc.2d 170, 173, 423 N.Y.S.2d 132, 134 (N.Y. Sup.Ct. Suffolk Co.1979) (rights, duties, and liabilities of joint venture to be tested by rules substantially the same as those which govern partnership).

Plaintiff, in his deposition testimony, expressly stated that he assumed no liability nor responsibility for losses of the business. Indeed, he states that only Sandhaus had any personal liability for the debts or torts of the enterprise and that plaintiff was under no obligation to return any money advanced to him. Kleinbaum Affidavit, Exhibit K (Weinreich deposition at 22930).

It would be inequitable to allow a party to claim the rights and benefits of partnership or joint adventure, while at the same

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deposition that he was not obligated to return any monies advanced even if the debts of the business exceeded its liabilities. Kleinbaum Affidavit, Exhibit K (Weinreich deposition at 230). Obviously, if plaintiff received $16,000 free and clear, irrespective of whether there were any net profits, the amount advanced did not represent a "draw on future profits." Cf. Cassidy v. Hall, 97 N.Y. 159, 168 (1884) (a party interested in profits of a business as a means of compensation for services rendered is not a partner); Kramer v. World-Wide Trading Co., Inc., 195 A.D. 305, 308, 187 N.Y.S. 16, 19 (1st Dept. 1921) (inherent in notion of someone receiving a share of net profits in return for his services is the risk of his receiving nothing should the costs equal or exceed the gross revenues).

time, allow that party to disclaim the legal liabilities which the relationship imposes. For a party to risk the "fair value" of his services may well be equivalent to another party risking the value of his financial investment. However, it is elemental that the sharing of liability for the actions of one another in the conduct of a partnership or joint venture goes to the core of the fiduciary obligations established by such a relationship. Cf. Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1078 (2d Cir.1977) (partners owe each other the utmost good faith, fairness, and loyalty), cert. denied, 434 U.S. 1035 (1978); Crane and Bromberg, Law of Partnership s 68 (1968) ("The unique feature [partners] have in partnership is their symmetry; each partner is, roughly speaking, both a principal and an agent, both a trustee and a beneficiary, for he has the property, authority and confidence of his co-partners, as they do of him. He shares their profits and losses, and is bound by their actions. Without the protection of fiduciary duties 'each is at the others' mercy.")

In light of plaintiff's deposition testimony in which he concedes that he assumed no liability nor responsibility for the debts or obligations of the enterprise, and was not obligated to return any of the $16,000 and reimbursement monies advanced to him in the event there were no profits, we find that there is no genuine issue of material fact as to whether the plaintiff agreed to bear the burden of losses. We hold as a matter of law that he did not.

Furthermore, assuming arguendo that plaintiff's mere risk of receiving something less than the "fair value" of his labor satisfies the burden of loss requirement for joint adventurers under New York law, plaintiff's understanding that from the formation of the relationship only Sandhaus would be personally

liable for the conduct of the enterprise is clear indication that there was no intent on the part of either party to create a joint venture. The manifestation of intent to form a joint venture need not be explicit but the parties must be clear that they intend to form a fiduciary relationship and not a simple contract. See Precision Testing Laboratories, 644 F.Supp. at 1349 (citing Yonofsky v. Wernick, 362 F.Supp. 1005 (S.D.N.Y.1973)). That the parties may have agreed together to act in concert to achieve some stated economic objective is not enough by itself to create a joint venture. See Steinbeck, 4 N.Y.2d at 317, 175 N.Y.S.2d at 13 (quoting Hasday v. Barocas, 10 Misc.2d 22, 28-29, 115 N.Y.S.2d 209, 216 (N.Y. Sup.Ct. New York Co.1952)); see also Mitler v. Friedeberg, 32 Misc.2d 78, 222 N.Y.S.2d 480, 485 N.Y. Sup.Ct. New York Co.1961) (agreement to act in concert or to distribute proceeds of enterprise on a percentage basis does not constitute joint venture if enterprise does not represent joinder of property, skills and risks).

Plaintiff's admitted lack of responsibility for the potential liabilities of the business other than the risk of receiving less than the "fair value" of his labor does not create the fiduciary obligation which arises from the "coagulation of property, profits or other interests which the parties can be said to hold jointly and which are made accessible to each other in terms of the confidential relationship which exists between joint associates." Hasday, 115 N.Y.S.2d at 216. Therefore, as there is no issue of material fact as to whether the parties entered into a joint venture, we grant defendant's motion for summary judgment as to plaintiff's first three joint venture causes of action.[5]

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5. Having so decided, it is unnecessary to discuss defendants' other contentions with regard to the joint venture causes of action.

Appendix F

E. Quantum Meruit

Defendants next argue that plaintiff's quantum meruit cause of action must be dismissed since plaintiff testified at his deposition that he was not making any claim for services rendered. Defendants, citing Halloran v. Ohlmeyer, 618 F.Supp. 1214, 122021, (S.D.N.Y.1985), contend that since plaintiff's deposition testimony contradicts his affidavit, this court is required to disregard the affidavit.[6] Reply Memo. at 16. We disagree.

Q. You previously testified that you are not making any claim for compensation for services rendered in this litigation; is that correct?

A. Financial compensation, money. That is payment for services rendered.

Q. You are not making?

A. Correct.

May 20, 1989 Affidavit of Richard Sandhaus, Exhibit P (Deposition of Stephen Weinreich at p. 323).

Plaintiff's Affidavit reads in relevant part:

I clearly am making a claim for services rendered despite defendants' attempt to misconstrue my testimony to the contrary.

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6. Plaintiff's deposition testimony in relevant part reads: roughly $16,000.00 I have taken in drawings against profits.

Appendix F

What I meant in my deposition testimony was that I do not feel that my primary claim is for services rendered since I contributed those services to further my own business. However, if this court does not confirm my right to that business, I am certainly entitled to the value of my work which is far in excess of the roughly $16,000.00 I have taken in drawings against profits.

— May 5, 1989 Affidavit of Stephen Weinreich at 4-5.

In Halloran, there were factual discrepancies between the plaintiff's affidavit and his deposition testimony. In his deposition, the plaintiff in Halloran testified that an agreement contemplated an ongoing relationship, while in his affidavit, the plaintiff asserted that the same agreement contemplated only a "one-shot deal." The plaintiff in Halloran made no attempt to explain the discrepancy between his affidavit and deposition testimony. It was for this reason that the district court stated that the factual claims in the affidavit must be disregarded. Halloran, 618 F. Supp. at 1220-21. Further, it was in this context that the district court found that the policy issues enunciated by the Second Circuit regarding such discrepancies were implicated. In Perma Research & Dev. Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969) the Second Circuit stated:

If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Here, the plaintiff's "contradictory" statements are not factual averments but rather a layperson's interpretation of his claims. Further, any potential contradictions with his deposition

testimony were expressly explained by plaintiff in his affidavit. Therefore, the concerns of the Second Circuit are not implicated. As such, defendant's argument urging dismissal of plaintiff's fourth cause of action sounding in quantum meruit is without merit, and we deny summary judgment as to that claims.[7]

Defendants also move for dismissal of defendant Science Faction Systems from the action on the ground that no such entity ever existed. Plaintiff does not contradict this assertion nor does plaintiff oppose such relief. Pltf. Memo. at 1. Accordingly, we dismiss defendant Science Faction Systems from the action.

F. Rule 56(g)

Finally, plaintiff asserts in his memorandum of law, without bringing a formal motion, that defendants should be required to

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7. Defendants citing City of Yonkers v. Otis Elevator Co., 844 F.2d 42 (2d Cir. 1988), and Radio Today, Inc. v. Westwood One, Inc., 684 F. Supp. 68 (S.D.N.Y. 1988), argue that plaintiff's quasi-contract cause of action must be dismissed as a matter of law because an action for quantum meruit is precluded where the subject matter is covered by an express agreement. Defendants' Supplemental Memorandum of Law at 11-12. This argument is without merit. In both Otis Elevator and Radio Today the court found that plaintiff's quasi-contract cause of action could not be maintained in view of the fact that a valid contract existed covering the same subject matter. Here, one of the issues remaining in the case is whether the May 1st Letter constitutes a valid contract between the parties and whether defendants have breached it. Indeed, defendants characterize the May 1st Letter as only a "preliminary agreement to agree." Id. at 13. Therefore, defendants' assertion that plaintiff's mere allegation that a valid contract exists precludes an alternative quantum meruit cause of action, is without merit. Cf. Marcella v. ARP Films, Inc., 778 F.2d 112, 117 (2d Cir. 1985) (party may submit case on both breach of contract and quantum meruit grounds).

pay costs and attorney's fees pursuant to Fed. R. Civ. P. 56(g).[8] Specifically, plaintiff objects to a statement in the April 10, 1989 affidavit of defendant Sandhaus which asserts that DSPI paid all the manufacturing and production expenses of the Silver System, and that the Silver System generated only $6000 of rental income, see Pltf. Memo. at 18, and statements in the May 20, 1989 affidavit of defendant Sandhaus (the "May 20th affidavit") in which Sandhaus states that he did not recall making a statement that the 2000 series projectors did not utilize closed loop scanners. See Pltf. Reply Memo. at 31-33.

Plaintiff states that he paid $900 of the Silver System expenses and that the Silver System generated at least an additional $6300 in rental income than defendants acknowledge in the May 20th affidavit. Id. at 31. Plaintiff also points out that Sandhaus testified in deposition that the 2000 Series did, in fact, use closed loop scanners. Id. at 32-33.

As an initial matter, the allegedly erroneous statements in the affidavits have no material affect on the disposition of this motion. This is a sufficient basis to deny plaintiff's application. See Faberge, Inc. v. Saxony Products, Inc., 605 F.2d 426, 429 (9th Cir. 1979) (Rule 56(g) sanctions not applied where affidavit did

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8. Fed. R. Civ. P. 56(g) reads in relevant party:

> Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party, including reasonable attorney's fees. . . .

not prejudice disposition of motion even if court assumed it was submitted in bad faith); see also 10A C. Wright & A. Miller, Federal Practice and Procedure s 2742 (2d ed. 1983). Second, the statements to which plaintiff objects, particularly regarding the closed loop scanners, are in an ambiguous context making a definitive assessment of their accuracy at this juncture difficult. Moreover, even assuming the statements in the affidavits are inaccurate, we are not convinced that the affidavits supporting the instant motion were submitted in bad faith or for a dilatory purpose. As such, we decline to assess Rule 56(g) sanctions against defendants.

Defendants assert, also without bringing a formal motion and without reference to authority, that plaintiff's attempts to create "spurious issues" by raising the Rule 56(g) application warrant the imposition of costs and fees against plaintiff. Upon consideration, we decline to impose such sanctions.

Conclusion

For the reasons articulated above:

1. The motion for summary judgment pursuant to Fed. R. Civ. P. 56 by defendants Richard Sandhaus a/k/a Dick Sandhaus, Science Faction Corporation, Dick Sandhaus Productions, Inc., and Science Faction Systems is granted as to the first, second, and third causes of action;

2. The motion for summary judgment by defendants Richard Sandhaus a/k/a Dick Sandhaus, Science Faction Corporation, Dick Sandhaus Productions, Inc., and Science Faction Systems is denied as to the fourth and fifth causes of action;

3. Defendant Science Faction Systems is dismissed as a defendant from the action;

4. Plaintiff Stephen Weinreich's application for sanctions pursuant to Fed. R. Civ. P. 56(g) is denied;

5. Defendants' request for costs and attorney's fees is denied.

SO ORDERED.